& Company *et al.* (No. 4939), is the first and best lien.

"That the costs made in this action is the second best lien.

"That the judgment and costs of Timothy Fahey with interest thereon to the date of the sheriff's sale, is the third best lien.

"That the judgment and costs of Bryan and Prendergast Bros., with interest thereon to the date of the sheriff's sale, is the fourth best lien.

"That the judgment and costs of the laborers, represented by H. T. Van Fleet, with interest thereon to the date of the sheriff's sale, is the fifth best lien.

"That the judgment of the New Philadelphia Pipe Works Company, with interest thereon to the date of the sheriff's sale, is the sixth best lien.

"It is therefore ordered, adjudged, and decreed that the said sheriff should out of said fund pay:

"*First*—All costs in the case of the New Philadelphia Pipe Works Company against Samuel R. Bullock & Co., to wit, $663.67.

"*Second*—All the costs of this action, to wit, $344.78.

"*Third*—To Timothy Fahey, the amount of his judgment and costs with interest, to wit, $2,933.58.

"*Fourth*—To Bryan and Prendergast Bros., the amount of their judgment and costs, with interest, to wit, $188.82.

"*Fifth*—To H. T. VanFleet, the amount of the laborers' judgment and interest, to wit, $3,596.29.

"*Sixth*—To the assignee of the New Philadelphia Pipe Works Company the amount of the judgment with interest, to wit, $———."

To all of which the said the New Philadelphia Pipe Works Company, Alexander M. Byers, Ezra Nicholson, and the Cleveland, Lorain & Wheeling Railroad Company, each then and there excepted.

Messrs. **Marvin & Cook** for plaintiff in error.

Mr. **Charles C. Fisher** for defendants in error Jocob S. Brady *et al.*

Dickman, *Ch. J.*, delivered the opinion of the court:

The main question that claims our consideration is, whether the court of common pleas, by virtue of the affidavit which accompanied the filing of the petition of the New Philadelphia Pipe Works Company, on August 30, 1887, acquired jurisdiction and was authorized by law to issue the order of attachment against the property of the partnership firm of Samuel Bullock & Company. The action was commenced on the last-named day against the defendants in their firm name and none other; and the affidavit in attachment alleged the following facts, and none other: "Ezra Nicholson, being duly sworn, says that he is the secretary and treasurer of the New Philadelphia Pipe Works Company, an incorporated company under the laws of the state of Ohio; that the claim sued upon in the action is upon a contract for an amount of water pipe sold and delivered to said Samuel R. Bullock & Company, a partnership formed for the purpose of doing business in Ohio; that said claim is just, and that affiant believes that the said New Philadelphia Pipe Works Company ought to recover $29,947.04, and interest from August 20, 1887; that the defendants are nonresidents of the state of Ohio." The record discloses that the partnership was composed of Samuel R. Bullock and William S. Mercer, and that neither of the individual members of the firm resided in Ohio at the time the order of attachment was issued.

Section 5011 of the Revised Statutes provides that: "A partnership formed for the purpose of carrying on a trade or business in this state, or holding property therein, may sue or be sued by the usual or ordinary name which it has assumed, or by which it is known; and in such case it shall not be necessary to allege or prove the names of the individual members thereof." By section 5042 of the Revised Statutes, regulating the manner of service and return of summons, it is provided that: "The service shall be by delivering, at any time before the return day, a copy of the summons, with the indorsements thereon, to the defendant personally, or by leaving a copy at his usual place of residence, or, if the defendant is a partnership sued by its company name, by leaving a copy at its usual place of doing business."

And under section 5521 of the Revised Statutes, among the grounds upon which an attachment may issue, the plaintiff, in a civil action for the recovery of money may, at or after the commencement thereof—if the claim is a debt or demand arising upon contract, judgment, or decree—have an attachment against the property of the defendant, "when the defendant, or one of several defendants, is a foreign corporation, or a nonresident of this state."

In view of these statutory provisions, the validity of the attachment called in question must evidently depend upon whether the partnership of Samuel R. Bullock & Company, sued by the firm name only—neither of its members then residing in Ohio—was a "defendant nonresident of this state" at the time the order of attachment was issued, within the meaning of the language of the statute.

The privilege extended by the statute to sue a partnership by the usual or ordinary name which it has assumed, or by which it is known, is not to be confined to such as may be formed within this state for the purpose of carrying on a trade or business, or holding property herein. Indeed, a partnership may be formed in another state for accomplishing the same purpose in this state; its component members may all reside in the state where it is formed, and if it does business in this state, it may be sued by its company name, and served by leaving a copy of the summons at its usual place of doing business in this state. It may be thus sued and thus served, irrespective of the residence of those who compose it.

The fact, however, that such partnership engages in business in this state, that it may be sued in the company name, and that it may be served by leaving a copy of the sum-

mons at a prescribed place, are not the sole factors for fixing and determining its residence when it is sought to reach its property by attachment for the benefit of its creditors. The members of a partnership do not form a collective whole, distinct from the individuals composing it; nor are they collectively endowed with any capacity of acquiring rights or incurring obligations. The rights and liabilities of a partnership are the rights and liabilities of the partners. 1 Lindley, Partn. 5. It is not a creation in which the identity of the individual members is merged and lost, in seeking to enforce against them the obligations of the firm.

A partnership is not, in our judgment, a legal entity, having, as such, a domicil or residence separate and distinct from that of the individuals who constitute it. To what extent residence may be affirmed of a partnership as such, was considered by the court in *Fitzgerald* v. *Grimmell*, 64 Iowa, 261. In the dissenting opinion there is much force, and we cite the same with our concurrence. "Residence," says Adams, *J.*, "in my opinion, can be predicated only of a person natural or artificial. A partnership, as distinguished from the members composing it, is neither. Besides, it appears to me that, in any view, the mere fact that a partnership maintains for the transaction of its business an established agent in a county where neither partner resides, cannot constitute the partnership a resident of such county. There is no pretense that an individual would become a resident of a county by merely transacting business therein through an established agent, and I am not able to see that a different rule should be applied to a partnership."

A principal reason for authorizing a suit against a partnership by its company name, to wit, the inability often times to find out the names of constituent partners, is applicable alike to domestic and foreign partnerships. In view of such inability—more apt to arise where the partners all reside in another state—that statute specifically provides, that when a partnership is sued by its usual or ordinary name, "it shall not be necessary to allege or prove the names of the individual members" of the firm. Whether the partnership was formed in this state or in another state, the names of the individual members are not required to be alleged; and whether a defendant partnership should be deemed a nonresident of the state in an attachment of its property on the ground of nonresidence, should depend upon the fact of the nonresidence of the constituent members, and not upon the mere mention of names of those who constitute the firm. It being conceded that the first attachment in favor of the New Philadelphia Pipe Works Company would have been valid if the proceeding had been against Samuel R. Bullock and William S. Mercer, partners, as Samuel R. Bullock & Company, with an accompanying affidavit that the defendants were nonresidents of Ohio, the failure to allege the individual names of the partnership should not, we think, render the attachment invalid, when the affidavit states the fact that the defendants were nonresidents of the state, and the statute renders it unnecessary to set forth the names of the partners. As an attachment may issue on the ground that the defendant is a nonresident of the state, it would seem to be the policy of the law, when the defendants reside in a foreign jurisdiction, and their names are unknown to the plaintiff, and they are doing business in this state under a partnership name, that creditors might protect their rights by attachment proceedings against the defendants in the name by which they elect to hold themselves out to the public and obtain credit.

It may perhaps be urged that although the individual partners composing a firm reside in another state the partnership is to be deemed resident in a state where it has a "usual place of doing business." But the statute, in prescribing the manner of service and return of summons, recognizes both a place of residence and a place of business, and the one is not to be regarded as identical with the other. A person or a number of persons may be domiciled or reside in one state, and have an agent and place of doing business in another, even as a corporation domiciled within the state by which it was created, may have its agent and a usual place of doing business in another state. The principal action may exist, and the partnership under the company name, may be brought into court through actual service by leaving a copy of the summons at its usual place of business, while an ancillary proceeding by attachment to secure the rights of creditors, may be sustained by reason of the fact of nonresidence; and when the attachment issues, it is not necessary that there should be constructive service on the defendants by publication, but there may be service of process at the usual place of business which they have established in this state. *Smith* v. *Hoover*, 39 Ohio St. 249.

It follows from the aforegoing considerations, that the affidavit upon which the first attachment was issued in favor of the New Philadelphia Pipe Works Company was adequate to give the court jurisdiction to issue the attachment, and thereby acquire jurisdiction over the property.

Subject therefore to the liens for costs as adjudged by the circuit court, the claims of the laborers represented by H. T. Van Fleet, should be held valid liens and first in order of priority upon the property taken in attachment; but, subordinate to such claims, the judgment in favor of the New Philadelphia Pipe Works Company should be the next best lien upon the property attached, or upon the funds derived from its sale.

The first attachment by the New Philadelphia Pipe Works Company being deemed valid upon the facts set forth in the record, it becomes unnecessary to consider whether objections to the attachment that may be taken advantage of by the defendants Samuel R. Bullock & Company can also be available to other creditors of those defendants.

The judgment of the Circuit Court should be reversed, and judgment rendered for the creditors of Samuel R. Bullock & Company in accordance with the priorities of lien as stated in this opinion.

CALIFORNIA SUPREME COURT (In Banc).

Victor MONTGOMERY, *Respt.*,
v.
SANTA ANA & WESTMINSTER R. CO., *Appt.*

(.....Cal.....)

1. A railroad for transportation of passengers and freight on a street does not impose a new burden or servitude upon the owner of the soil, although he may be entitled to damages for injury to his right of access, or light and air.

2. An ouster which will sustain ejectment by the owner of the soil of a highway is not made by constructing a railroad thereon by permission of the municipal authorities.

(September 13, 1894.)

APPEAL by defendant from a judgment of the Superior Court for Orange County in favor of plaintiff in an action brought to recover possession of a portion of the street in front of plaintiff's premises, upon which defendant had constructed its tracks. *Reversed.*

The facts are stated in the opinion.

Mr. **Victor Montgomery,** respondent *in propria persona:*

If the city authorities have no power to construct and operate a steam railroad on a public street they cannot bestow such power upon any one else.

North Beach & M. R. Co's App. 32 Cal. 510; *Southern Pac. R. Co. v. Reed,* 41 Cal. 262.

In *Milhau v. Sharp,* 27 N. Y. 622, 84 Am. Dec. 314, the court said: "The resolution is therefore void, for the reason that it purports to create a franchise which the common council had no power to create; to vest in the defendants an exclusive interest in the streets, which the common council had no power to convey, etc."

By laying said track, appellant acquired an interest in the land.

Civil Code, §§ 14, 660.

To the extent that said track rested upon and was imbedded in said land, it was a "taking" within the constitutional provision.

As appellant had the exclusive right to run cars on said track, it was an "exclusion" of the respondent and the public from that portion of the highway covered by said railroad track.

Weyl v. Sonoma Valley R. Co. 69 Cal. 205; *Williams v. New York Cent. R. Co.* 16 N. Y. 100, 69 Am. Dec. 651; *Mahon v. New York Cent. R. Co.* 24 N. Y. 659; *Wager v. Troy Union R. Co.* 25 N. Y. 526; *Waterloo Presby. Soc. Trustees v. Auburn & R. R. Co.* 3 Hill, 569; *Reichert v. St. Louis & S. F. R. Co.* 51 Ark. 491.

The abutter may also maintain ejectment against a railroad company which has placed its track upon his side of a street without paying or tendering damages therefor.

Elliott, Roads & Streets, 536; Angell, Highways, § 319; *Dovaston v. Payne,* 2 H. Bl. 527; 2 Smith, Lead. Cas. 9th ed. p. 161; *Mayhew v. Norton,* 17 Pick. 357, 28 Am. Dec. 304; *Terre Haute & S. R. Co. v. Rodel,* 89 Ind. 128; Sedgwick & Wait, Trial of Title to Lands, §§ 132, 135; *Carpenter v. Oswego & S. R. Co.* 24 N. Y. 655; *West Corington v. Freking,* 8 Bush, 121; *Read v. Leeds,* 19 Conn. 188; *Reichert v. St. Louis & S. F. R. Co. supra.*

An abutting owner cannot be deprived of his rights, though for a public purpose, without compensation first being made.

Schaufele v. Doyle, 86 Cal. 107; *Theobo'd v. Louisville, N. O. & T. R. Co.* 4 L. R. A. 735, 66 Miss. 279; *Ford v. Santa Cruz R. Co.* 59 Cal. 290, and cases there cited by respondent's counsel.

Municipal ordinance granting the right of way along a street is no defense.

Fletcher v. Auburn & S. R. Co. 25 Wend 462; *East End Street R. Co. v. Doyle,* 9 L. R. A. 100, 88 Tenn. 747; *Denver Circle R. Co. v. Nestor,* 10 Colo. 403; *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146.

A steam railroad in the street was held to be an additional burden in the following cases:

East End Street R. Co. v. Doyle, supra; Pappenheim v. Metropolitan Elev. R. Co. 13 L. R. A. 401, 128 N. Y. 436; *Harmon v. Louisville, N. O. & T. R. Co.* 87 Tenn. 614; *Ford v. Santa Cruz R. Co. supra; North Chicago City R. Co. v. Lake View,* 105 Ill. 207, 44 Am. Rep. 788; *Stanley v. Davenport,* 54 Iowa, 463, 37 Am. Rep. 216; *Starr v. Camden & A. R. Co.* 24 N. J. L. 592; *Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co.* 20 N. J. Eq. 61; *Springfeld v. Connecticut River R. Co.* 4 Cush. 63; *Stange v. Hill & W. D. Street R. Co.* 54 Iowa, 669; *Sears v. Marshalltown Street R. Co.* 65 Iowa, 742; *Fanning v. Osborne,* 34 Hun, 121; *Grand Rapids & I. R. Co. v. Heisel,* 47 Mich. 393; *Burlington & M. R. Co. v. Reinhackle,* 15 Neb. 279, 48 Am. Rep. 342; *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268; *Denver Circle R. Co. v. Nestor,* 10 Colo. 403; Cooley, Const. Lim. 676; 2 Dill. Mun. Corp. §§ 680–683, also §§ 704–717; Mills, Em. Dom. §§ 202–207; Pierce, Railroads, §§ 242–246; Washb. Easements & Servitudes, 4th ed. § 252.

Ejectment is a proper remedy where the abutter has title to the center of the highway.

Uline v. New York Cent. & H. R. R. Co. 101 N. Y. 98, 53 Am. Rep. 123, 54 Am. Rep. 661; *Wager v. Troy Union R. Co.* 25 N. Y. 526; *Heard v. Brooklyn,* 60 N. Y. 242; *Graham v. Columbus & I. Cent. R. Co.* 27 Ind. 260, 89 Am. Dec. 498; *Cox v. Louisville, N. A. & C. R. Co.* 48 Ind. 178; *Harrington v. St. Paul &*

NOTE.—While the above case is in conflict with what a few years ago would have been the overwhelming weight of authority (see *note* to Western Railway of Alabama v. Alabama Grand Trunk R. Co. (Ala.) 17 L. R. A. 474), yet there is what seems to be a growing tendency on the part of some of the courts to depart from the old doctrine. In addition to the cases cited in the opinion attention is called to Ottawa, O. C. & C. G. R. Co. v. Larsen (Kan.) 2 L. R. A. 59, and Nichols v. Ann Arbor & G. Street R. Co. (Mich.) 16 L. R. A. 371, in which the Michigan court was equally divided upon a similar question.

See also 26 L. R. A. 246; 41 L. R. A. 335.

S. C. R. Co. 17 Minn. 215; *Jersey City* v. *Fitzpatrick*, 30 N. J. Eq. 97; *Pittsburgh & L. E. R. Co.* v. *Bruce*, 102 Pa. 23; Wood, Railway Law, 821; Mills, Em. Dom. 2d ed. § 856; Lewis, Em. Dom. § 647; 1 Redf. Railways, 6th ed. 332; *Louisville, St. L. & T. R. Co.* v. *Liebfried*, 92 Ky. 407; *Syracuse Solar Salt Co.* v. *Rome, W. & O. R. Co.* 67 Hun, 153; *Western Railway of Alabama* v. *Alabama G. T. R. Co.* 17 L. R. A. 474, 96 Ala. 272; Washb. Easements & Servitudes, 4th ed. § 292; *Mahon* v. *San Rafael Turnp. Road Co.* 49 Cal. 269; *San Francisco City & County* v. *Sullivan*, 50 Cal. 605; *Coburn* v. *Ames*, 52 Cal. 385, 28 Am. Rep. 634; *Visalia* v. *Jacob*, 65 Cal. 436, 52 Am. Rep. 303; *Weyl* v. *Sonoma Valley R. Co.* 69 Cal. 202; *Finch* v. *Riverside & A. R. Co.* 87 Cal. 598.

Per Curiam:

This is an action of ejectment to recover possession of a strip of land in the city of Santa Ana, county of Orange.

Plaintiff had judgment, from which, and from an order denying a motion for a new trial, defendant appeals.

Defendant, by its answer, set up two separate defenses. In the second of these it set out (1) that it is a corporation with power to construct and operate a steam railroad for the transportation of freight and passengers from the city of Santa Ana to Westminster, across, along, and upon any street, avenue, or highway; (2) that a strip of land 30 feet in width off the entire north side of the land described in the complaint was and is a public street or highway in said city of Santa Ana, under the control of and in the possession of the board of trustees of said city; (3) that said board of trustees, by ordinance, authorized and licensed defendant to construct and operate a railroad through and over said street, for carrying freight and passengers in cars to be propelled by dummy or motor engines; (4) that it constructed its road on said street, and operated it as provided in said ordinance; (5) that it has not excluded plaintiff or others from the street, and has only used it for the purpose aforesaid, and in common with the public, and has not impaired said street, or curtailed the use thereof by others, etc. To this defense plaintiff demurred, upon the ground that it did not state facts sufficient to constitute a defense. The demurrer was sustained by the court, and defendant declined to amend as to this defense, and the action of the court in sustaining the demurrer is urged as error.

The whole proposition involved in this case may be put thus: Can the owner in fee of land abutting upon a public street in an incorporated town maintain an action of ejectment against a railroad company organized and existing for the transportation of freight and passengers from said town to a neighboring town, which company, under and by virtue of an ordinance of the trustees of the first-designated town empowering it to do so, has constructed and is using a railway track upon and over said public street and upon the side or half thereof adjoining the land of such abutting owner? The question is stated thus for the reason that, while the evidence in the case, consisting of the deed to respondent and the city map together, show that his land abutted upon the street in question, viz., Second street, in the city of Santa Ana, yet by section 1112 of the Civil Code "a transfer of land bounded by a highway passes the title of the person whose estate is transferred to the soil of the highway to the center thereof, unless a different intent appears from the grant." There is nothing in the evidence to indicate the contrary, and hence we must presume respondent owns to the center of the highway or street, subject only to the right of the public to an easement or right of way for street purposes therein and thereto. All streets are highways, but not all highways are streets. *Indianapolis* v. *Croas*, 7 Ind. 9; *Lafayette* v. *Jenners*, 10 Ind. 74; *Clark* v. *Com.* 14 Bush, 166. In other words, there is a wide distinction between a highway in the country and a street in a city or village, as to the mode and extent of the enjoyment, and, as a sequence, in the extent of the servitude in the land upon which they are located. The country highway is needed only for the purpose of passing and repassing, and as a general rule, to which there are a few needed exceptions, the right of the public and of the authorities in charge is confined to the use of the surface, with such rights incidental thereto as are essential to such use. In the case of streets in a city there are other and further uses, such as the construction of sewers and drains, laying of gas and water pipes, erection of telegraph and telephone wires, and a variety of other improvements, beneath, upon, and above the surface, to which in modern times urban streets have been subjected. These urban servitudes are essential to the enjoyment of streets in cities, and to the comfort of citizens in their more densely populated limits. It has sometimes been suggested that a distinction is to be made between cases in which streets are laid out and opened upon property belonging to the corporation, and those in which streets become such by dedication, or by condemnation proceedings under the right of eminent domain upon compensation being made; but the consensus of modern opinion seems to be that no such distinction properly exists, and that "whether the corporation be the owner of the fee of the streets in trust for the public, or whether it be merely the trustee of the streets and highways as such, irrespective of any title to the soil, it has the power to authorize their appropriation to all such uses as are conducive to the public good, and do not interfere with their complete and unrestricted use as highways." *People* v. *Kerr*, 27 N. Y. 202; *Cincinnati* v. *White*, 31 U. S. 6 Pet. 432, 8 L. ed. 453; Thompson Highways, p. 7; Elliott, Roads & Streets, p. 305. It is said by Elliott, in his work on Roads and Streets, at page 299, that "it is doubtful whether, of all servitudes, there is one so broad and comprehensive as that of a city in its streets." It authorizes the use of the street for the track of a street-car company under license by the city authority, without compensation to the owner of the fee. *Finch* v. *Riverside & A. R. Co.* 87 Cal. 598.

A "street railway" has been defined as "a

railway laid down upon roads or streets for the purpose of carrying passengers." Elliott, *supra*, 557. It is further said by the same author that "the distinctive and essential feature of a street railway, considered in relation to other railroads, is that it is a railway for the transportation of passengers, and not of freight." It is said to exclude the idea of the carriage of freight, and that a railroad over which heavily laden freight trains are drawn cannot be considered a street railway. Street-cars are little more than carriages for transportation of passengers, propelled over fixed tracks, to which their wheels are adapted, and as a convenient, comfortable, and economical mode of conveyance, their use has become well-nigh universal in cities, and as they add, when properly constructed, little or nothing to the burdens of the servient tenement, their use is upheld without the necessity of compensation to the abutting owner. The use of a public street, however, for an ordinary railway for the transportation of freight and passengers, it has been said by the highest authority, imposes a new burden upon the street, not contemplated in its dedication, and therefore the user cannot be indulged without compensation to the abutting owner of property upon such public street. We are at a loss for any good reason for this distinction, or to see why the transportation of freight by modern and improved methods is not equally entitled to encouragement with the transportation of passengers. The essential wants of the citizen demand the former equally with the latter. If there is any difference in the burden imposed upon the street, it is in degree and not in kind. The great highways of England were constructed, not so much for the convenience of passengers as for the transportation of freight. In the infancy of commerce, when trade and traffic by land was insignificant in volume, when the sumpter horse, which answered to our modern pack mule, answered all the purposes of transportation for goods, footpaths, bridlepaths, and lanes served all needed purposes; but with the growth of inland commerce, and the need of greater facilities for the interchange of commodities, the use of wheeled vehicles, and, as a means thereto, the highway, as we know it, became a necessity. The Appian Way, commenced 312 B. C., which has provoked the admiration of the world, was entitled to commendation for its roadway 16 feet in width, constructed for the transportation of burdens, while the paths of 8 feet on each side of it for foot passengers, and upon which the Roman legions were wont to march, were unpaved. In the construction of modern highways, urban and suburban, the great difficulty and the prominent object has been to build and adapt them, by grade, width, and structure of roadbed, to the carriage of freight. Yet we are told in effect that, so far as modern methods are concerned,—so far as ease, speed, and economy are involved,—improvements are to be limited to the transportation of passengers; that cars with wheels adjusted to move upon fixed tracks, when applied to the transportation of passengers, are within the contemplated objects in view in opening a road or street, and therefore add nothing material to the burden of the servitude of the abutting landowner, while a precisely similar structure, adapted to the transportation of freight, adds an additional burden, of a different character, to the servitude, and cannot be tolerated without compensation to the abutting owner. An interminable string of heavy drays may thunder through the street from early morning until set of sun, a menace to all who frequent the thoroughfare, and an inconvenience to all dwellers thereon; but the cars of a railway, which move usually but a few times a day, and with infinitely less annoyance to the public, upon tracks so adjusted to the surface as to occasion little or no inconvenience, cannot be tolerated. We fail to appreciate the philosophy of the distinction. On the contrary, we affirm that, when a public street in a city is dedicated to the general use of the public, it involves its use, subject to municipal control and limitations, for all the uses and purposes of the public as a street, including such methods for the transportation of passengers and freight as modern science and improvements may have rendered necessary, and that the application of these methods, and indeed of those yet to be discovered, must have been contemplated when the street was opened and the right of way obtained, whether by dedication, purchase, or condemnation proceedings, and hence that such a user imposes no new burden or servitude upon the owner of the abutting land. The object of the user being within the conceded rights of the public, the methods of its accomplishment are subject to legislative control, and subject, also, to an action for damages by any abutting owner, whether or not he may be vested with the fee to the center of the street, whose right of ingress and egress, or his right to light and air, shall be interfered with.

The thirteenth subdivision of section 863 of the Municipal Government Act of this state authorizes the boards of trustees of municipalities of the sixth class, of which Santa Ana is one, "to permit, under such restrictions as they may deem proper, the laying of railroad tracks and the running of cars drawn by horses, steam or other power thereon . . . in the public streets." The world moves. Legislation in recent times has kept pace with the progress of the age. The trend of judicial opinion, except where overshadowed and incrusted with *stare decisis*, is to a broader and more comprehensive view of the rights of the public in and to the streets and highways of city and country; and, while carefully conserving the rights of individuals to their property, the courts have not hesitated to declare the shadowy title which the owner of the fee holds to the land in a public street or highway, during the duration of the easement of the public therein, as being subject to all the varied wants of the public, and essential to its health, enjoyment, and progress. In *Paquet* v. *Mt. Tabor Street R. Co.*, 18 Or. 233, which was an action to enjoin a steam-motor railway company from constructing and operating its road upon a street in the city of Portland

and upon a county road outside the city, abutting upon both of which the plaintiff owned land, with the fee in him vested to the center of the street and road, and where no compensation had been made to plaintiff, the court in its opinion, by Thayer, *Ch. J.*, in deciding the cause against plaintiff, said: "The establishment of a public highway practically divests the owner of a fee to the land upon which it is laid out, of the entire present beneficial interest, of a private nature, which he has therein. It leaves him nothing but the possibility of a reinvestment of his former interest in case the highway should be discontinued as such. This view, I am aware, is contrary to the ancient doctrine that the owner of the fee owned the land subject only to such public uses, and that he had a right of action when the use was diverted to a different purpose. Such a doctrine may have been applicable where the ownership was merely subject to a right of way over the land; but where, as in modern cases, it is devoted exclusively to the purposes of a public thoroughfare, and the control thereof is committed to legally constituted authorities charged with the duty of maintaining it for such purpose, the doctrine becomes a vague theory, and should be laid away among the antiquities of the past age." *McQuaid* v. *Portland & V. R. Co.* 18 Or. 237, enunciates a like doctrine. In *Henry Gaus & Sons Mfg. Co.* v. *St. Louis, K. & N. W. R. Co.*, 113 Mo. 308, 18 L. R. A. 339, the supreme court of Missouri held, in substance, that the construction and operation of an ordinary steam railroad at grade in a public street under municipal authority is not a new public use of the street, for which compensation may be demanded by abutting owners, as in the case of property "taken or damaged," within the meaning of the constitution. The court said: "When land is dedicated generally, and without restrictions, or condemned, for a public street, in a town or city, the owner of the abutting lots, who secures the benefit of the street, and persons also who purchase and improve property thereon, hold their property rights subject to all the uses to which the street can be lawfully subjected by the public. New uses in the improvement in the mode of travel and transportation are constantly arising. When there is no restriction on the public use, new modes of use may be adopted, which are consistent with the proper use of the street, without the consent of abutting owners, though such new uses may interfere somewhat with their own convenient use of the street. . . . For any damages that may be caused by an unlawful or negligent maintenance of the track in the street, or by negligent use of engines or movement of trains, defendant will be liable in an action for damages." This decision is in line with the decisions in that state. In Iowa a like doctrine prevails. In *Barney* v. *Keokuk*, 94 U. S. 324, 24 L. ed. 224, which was ejectment in the United States court for the district of Iowa, to recover certain premises within a public street in Keokuk, occupied with railroad tracks, buildings, sheds, etc.,—upon error to the Supreme Court of the United States, that tribunal held that although no permanent obstruction, like a depot building, could be erected on the streets of a town, yet it is held in that state (Iowa) that they may, by public authority, be occupied by railway tracks without the consent of the adjacent proprietors, and without compensation, whether the fee of the streets, as in that case, be in him or in a third person. The court further held that there was no substantial difference between streets in which the legal title is in private individuals, and those in which it is in the public, as to the rights of the public therein. *Kucheman* v. *C. C. & D. R. Co.* 46 Iowa, 366. In New Jersey it is held: (1) That the legislature has power to authorize the use of a public highway for the purpose of a railway. (2) That the legislature must be the judges as to the benefit to the public, and to their authority the public and individuals must submit. (3) The authority to use a public highway for the purpose of a railroad, retaining the use of such highway for all ordinary purposes, is not such a taking of private property for public purposes as requires compensation to the owner of the fee of the adjacent lands, as is contemplated by their constitution. (4) That the easement of the highway is in the public, although the fee is practically in the adjacent owner. "It is the easement only which is appropriated, and no right or title of the owner is interfered with." *Morris & E. R. Co.* v. *Newark*, 10 N. J. Eq. 352. In *Spencer* v. *Pt. Pleasant & O. R. Co.*, 23 W. Va. 406, which was a bill in equity to restrain defendant from constructing and operating an ordinary steam railroad over a public street, the fee of which was in plaintiff, under a license from the municipal authorities, the court used the following language: "Admitting she (the plaintiff) owns the fee to the middle of Seventh street opposite her lot, as she contends is the fact, she still owns the same, and neither her title nor possession is in any manner disturbed by the railroad company. It has always been subject to the easement of the public to pass and repass over it and to use it as a street; and, subject to this easement, she has as much the enjoyment and possession of the whole of Seventh street as she ever had. What the railroad company has taken it has taken from the town council of Point Pleasant,—a mere easement,—and it has taken nothing from the plaintiff, and therefore, under West Virginia authorities referred to, she is entitled to no injunction." In *Edwardsville R. Co.* v. *Sawyer*, 92 Ill. 377, the supreme court of Illinois held that the public authorities who have the superintendence and control of the public roads may authorize travel on them by the means of a railroad, and, where a railroad company has constructed its road upon and along a public road, such use and possession is a matter between the road authorities and the railroad company, and the right cannot be questioned in an action of ejectment by the owner of the land over which the public road has been established.

This being an action of ejectment to recover a specific piece or parcel of land, and it appearing from the stipulation of the par-

ties that the alleged ouster consisted only in the entry by the defendant upon a public street, and the construction of a railroad track thereon, no question of damage to property, other than to such public street, within the purview of section 14 of article 1 of the Constitution of this state, can arise.

We may admit that the views herein expressed are in conflict with the doctrine enunciated in *Southern Pac. R. Co.* v. *Reed*, 41 Cal. 256, and *Muller* v. *Southern Pac. Branch R. Co.* 83 Cal. 240, and it does not necessarily follow that ejectment will lie, if the facts set out in the answer are true. The cases above quoted were to recover damages. The cases of *Weyl* v. *Sonoma Valley R. Co.* 69 Cal. 203, and *Finch* v. *Riverside & A. R. Co.* 87 Cal. 597, in which ejectments were upheld, were cases in which the defendants were mere intruders upon the public street, without valid license from any authorized body. The rule, as defined in *Mahon* v. *San Rafael Turnp. Road Co.* 49 Cal. 270, is regarded as the true one in cases of ejectment for injuries like the one complained of here. It was said in that case: "The exclusion of the plaintiff from entering on the land, except on the payment of a toll, and then only for the purpose of passing over the same, was a disseisin." In the present case the answer to which the demurrer was sustained averred: "That this defendant has not excluded the plaintiff, or any one else, from said street, or any part thereof, nor does it claim to hold said street, or any part thereof, exclusively from the plaintiff, or any one else whomsoever; but this defendant only claims the right to use the portion of said street actually occupied by said track in common with the public, under and by virtue of said ordinances of the said board of trustees of said city, and not otherwise." The action of ejectment is a possessory action, in which the plaintiff must show himself entitled to the present possession, and that he has been deprived thereof. Anything which deprives a plaintiff of his present right of possession will deprive him of the remedy of ejectment. The case of *Redfield* v. *Utica & S. R. Co.* 25 Barb. 54, is on all fours with the present case; and the court there held that the claim of an easement was not a claim of title, and that the mere user of such easement by license of the public, without excluding others from a like user, did not amount to an ouster for which ejectment would lie,—intimating, but without deciding, that trespass was in such a case the proper remedy. *Edwardsville R. Co.* v. *Sawyer*, *supra*, is to like effect. The municipal authorities, as trustees of the public, are in possession of the public streets, and hold them for the uses of the public as effectually as they do or may the public buildings of the municipality. A writ of restitution which should put the plaintiff in possession of the street, except as one of the public, would constitute him guilty as a trespasser, or of a nuisance, or of erecting a purpresture, as the facts might determine. It has been said that a writ which authorized A. to be placed in possession of real property, subject to the possession of B., is an absurdity. Where A. enters upon a public street and constructs a railroad without authority from the municipal authorities, ejectment will lie, as was held in *Weyl* v. *Sonoma Valley R. Co.* and in *Finch* v. *Riverside & A. R. Co.* This rule proceeds upon the theory that, as defendant does not justify under one having a right to possession, it matters not, as to him, that another than the plaintiff may have a better right than either of the parties to the action. A reversioner may maintain an action for an injury to his reversionary right, but cannot recover possession until the limited estate lapses. So the holder of the title to a public street, the possession of which is held for the public, may maintain an action for damages to his property therein, but, as against one who has taken no possession thereof, and is only in the exercise of an easement therein which is conferred by the municipal authorities in pursuance of their power, and which is valid as to the public, and which will expire with the easement of the public, of which it is a part, should not be permitted to maintain ejectment for a violation of his property rights, if any, but should be remitted to an injunction to restrain, or, if the injury is consummated, to an action for damages, or to proceedings to abate as a nuisance, as the case may be.

It follows that the court below erred in sustaining the demurrer to the answer of the defendant.

The judgment is reversed, and the court below directed to overrule the demurrer to defendant's second defense, set out in his answer.

Neither **Beatty**, *Ch. J.*, nor **De Haven**, *J.*, participated in the foregoing decision.

MAINE SUPREME JUDICIAL COURT.

Mathew O'DONNELL, Admr., etc., of Thomas Welch, Deceased,
v.
MAINE CENTRAL R. CO.

(.....Me.....)

1. Employes of a contractor engaged in taking earth away from cars for a consignee, who, to facilitate the work, dump the earth from the car on request of the railroad crew, are not volunteers so as to preclude recovery from the railroad company for injury by the tipping over of a car due to defects therein and to improper loading.

2. One assisting the servants of another to facilitate his own business or that of his employer is not their fellow servant.

NOTE.—Upon the question of the master's liability for injuries to one assisting his servant, see *note* to Evarts v. St. Paul, M. & M. R. Co. (Minn.) 23 L. R. A. 663, 25 L. R. A.

See also 28 L. R. A. 573.

8. Eight thousand dollars is an excessive allowance for injuries resulting in the death six or seven month's later of an unskilled laborer twenty-three years old, who, without any family to support, had saved nothing from his earnings, especially when $5,000 is the statutory limit of recovery for death resulting from injuries immediately.

(Peters, Ch. J., Libbey and Haskell, JJ., dissent.)

(August 17, 1894.)

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Cumberland County, made during the trial, and motion for new trial after verdict in favor of plaintiff, in an action to recover damages for personal injuries resulting in death, and alleged to have been caused by negligence for which defendant was responsible. *Exceptions and motions overruled.*

The facts are stated in the opinion.

Messrs. **William L. Putnam** and **Drummond & Drummond**, for defendant:

In *Sherman* v. *Hannibal & St. J. R. Co.*, 72 Mo. 62, a boy got upon a freight train under such circumstances that the court held him to be a passenger, the brakeman requested the boy to perform a certain service on the train, which was a dangerous one, especially to a person not accustomed to railroad service; the court held that, as the brakeman had no authority whatever from the defendant, it owed no duty whatever to him while he was performing the service and that he could not recover.

To the same effect is *Everhart* v. *Terre Haute & I. R. Co.* 78 Ind. 292, 41 Am. Rep. 567.

The request of one not authorized to make the request imposes no duty upon the railroad company towards the one acting upon the request.

Conversely, a man who, without pay, assists as a brakeman in making up a train, by the direction or with the express permission of a yard master, who has authority to employ necessary assistants in his department, is not a trespasser on the train, but a servant of the company, to whom it will be liable for an injury resulting from the use of a defective brake.

Central Trust Co. of New York v. *Texas & St. L. R. Co.* 32 Fed. Rep. 448; *Wiscam* v. *Rickards*, 10 L. R. A. 97, 136 Pa. 109.

The court says: A servant cannot make a request, or give a permission, that shall affect the master's rights without his authority or permission.

McKinney, Fellow Servants, p. 49.

Messrs. **Harry R. Virgin** and **A. A. Strout**, for plaintiff:

Defendant was obliged to see that whatever appliances they used or provided for their servants to use in their business should be constructed in a reasonably safe manner, and should be kept in a reasonably safe state of repair.

Shanny v. *Androscoggin Mills*, 66 Me. 424; *Buzzell* v. *Laconia Mfg. Co.* 48 Me. 113, 77 Am. Dec. 212; Beach, Contrib. Neg. §§ 124, 125, and cases there cited.

If a car becomes defective, so that it creates more danger to those required to move or handle it, or in other words, if it is rendered less safe, then it is negligence on the part of the railroad to continue to use that car without first repairing it.

Sweeny v. *Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Heaven* v. *Pender*, L. R. 11 Q. B. Div. 507; *Coombs* v. *New Bedford Cordage Co.* 102 Mass. 595, 3 Am. Rep. 506; *Indermaur* v. *Dames*, L. R. 1 C. P. 285; Thomp. Neg. 970, and cases cited; *Guthrie* v. *Maine Cent. R. Co.* 81 Me. 582; *Shanny* v. *Androscoggin Mills* and *Buzzell* v. *Laconia Mfg. Co. supra*; *Gilman* v. *Eastern R. Co.* 13 Allen, 433, 90 Am. Dec. 210; *Snow* v. *Housatonic R. Co.* 8 Allen, 441, 85 Am. Dec. 720; *Ford* v. *Fitchburg R. Co.* 110 Mass. 240, 14 Am. Rep. 598; *Coombs* v. *New Bedford Cordage Co.* 102 Mass. 583, 3 Am. Rep. 506; *Cayzer* v. *Taylor*, 10 Gray, 280, 69 Am. Dec. 317; *Muirhead* v. *Hannibal & St. J. R. Co.* 19 Mo. App. 634; Beach, Contrib. Neg. § 124; *Keegan* v. *Western R. Corp.* 8 N. Y. 175, 59 Am. Dec. 476; *Mad River & L. E. R. Co.* v. *Barber*, 5 Ohio St. 541, 67 Am. Dec. 312; *Clarke* v. *Holmes*, 7 Hurlst. & N. 937; *Fuller* v. *Jewett*, 80 N. Y. 46, 36 Am. Rep. 575.

The corporation must act by its agents or servants, and Dolan being the servant who had full charge of the train, including the loading and supervision as to setting aside defective cars, Dolan's knowledge of the defect was in law the knowledge of the defendant, as to fellow servants, and *a fortiori* as to the plaintiff, who was not a fellow servant.

Laning v. *New York Cent. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417; *Wilton* v. *Middlesex R. Co.* 107 Mass. 110, 9 Am. Rep. 11; *Snow* v. *Housatonic R. Co.* 8 Allen, 447, 85 Am. Dec. 720.

The law defines a volunteer, in general, to be one who voluntarily assists the servant of another.

2 Thomp. Neg. p. 1045; Beach, Cont. Neg. § 120; Whart. Neg. § 201.

The injured person was not a volunteer, but engaged at the request or with the permission of the railway's agents in a transaction of interest as well to himself or his master as to the railroad company, and this entitles him to the same protection against the negligence of the company's servants as if he were at the time attending to his own private affairs.

Erson v. *S. & E. T. R. Co.* 65 Tex. 577, 57 Am. Rep. 606, citing and approving the principles of law laid down in *Holmes* v. *Northeastern R. Co.* L. R. 4 Exch. 254, L. R. 6 Exch. 123; *Wright* v. *London & N. W. R. Co.* L. R. 10 Q. B. 298; *McIntire Street R. Co.* v. *Bolton*, 34 Ohio St. 224, 54 Am. Rep. 803; *Indermaur* v. *Dames*, L. R. 1 C. P. 74, L. R. 2 C. P. 312.

Was the plaintiff in the exercise of reasonable prudence at the time of the accident?

This question was peculiarly a matter of fact for the determination of the jury.

Nugent v. *Boston C. & M. Railroad*, 80 Me. 62; *Plummer* v. *Eastern R. Co.* 73 Me. 591; *Lesan* v. *Maine Cent. R. Co.* 77 Me. 85; *Hobbs* v. *Eastern R. Co.* 66 Me. 575; *O'Brien* v. *McGlinchy*, 68 Me. 555, and many others; also, *Thomas* v. *Western U. Teleg. Co.* 100 Mass. 156; *Chaffee* v. *Boston & L. R. Corp.* 104 Mass.

108; *Gaynor* v. *Old Colony & N. R. Co.* 100 Mass. 208, 97 Am. Dec. 96; *Lund* v. *Tyngsboro*, 11 Cush. 563; *Mahoney* v. *Metropolitan R. Co.* 104 Mass. 75; *Clarke* v. *Holmes*, 7 Hurlst. & N. 937; *Laning* v. *New York Cent. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417.

Is a verdict of $8,000 excessive as a compensation for the suffering of mind and body, caused by a leg broken so that the bones protruded through the flesh, which never healed, but which grew worse, so that the bruised places on his leg sloughed off and made sores; and by a broken back and bruised places thereon that sloughed off and made sores of enormous size, finally exposing the back bone and the cartilages binding it together, and that became so offensive from the odor arising therefrom that it was well nigh impossible to stay in the room long enough to dress his wounds, the dressing of his back being so painful that it seemed to the nurse that the man would be dead when he turned him back; for such suffering, is $8,000 too much?

"The law presumes a verdict to be correct." Hilliard, New Trials, 16.

And until it is proved to be incorrect, the verdict will not be set aside.

Hobbs v. *Eastern R. Co.* 66 Me. 579; *Thompson* v. *Mussey*, 3 Me. 305, and cases cited; *Bruce* v. *Rawlins*, 3 Wils. 61; *Hanson* v. *European & N. A. R. Co.* 62 Me. 90, 16 Am. Rep. 404; *Coleman* v. *Southwick*, 9 Johns. 50, 6 Am. Dec. 253, citing many cases.

In *Secord* v. *St. Paul, M. & M. R. Co.*, 18 Fed. Rep. 221, a verdict for $7,000 for broken collar bone and arm (the fractured bones having united) was sustained.

For contusion of scalp and chest, verdicts for $5,000,—*Houston & T. C. R. Co.* v. *Boehm*, 57 Tex. 152; $10,000,—*Porter* v. *Hannibal & St. J. R. Co.* 71 Mo. 66, 36 Am. Rep. 454; $15,000,—*Collins* v. *Council Bluffs*, 32 Iowa, 324, 7 Am. Rep. 200.

Walton, J., delivered the opinion of the court:

It appears that the Maine Central Railroad Company, while engaged in transporting earth for its own use, undertook to deliver some earth for the use of Mr. H. N. Jose; and the evidence tends to show that the crew in charge of the gravel train requested the men employed by Mr. Jose to assist in dumping the earth out of the cars, and that, while so engaged, a broken car, unevenly loaded, tipped over, and fell upon one of Mr. Jose's men (Thomas Welch), and inflicted injuries of which he afterwards died. For these injuries, the administrator of Welch has recovered a verdict against the railroad company for $8,000 damages. The case is before the law court on exceptions and motion for a new trial. We will first examine the exceptions.

1. It is insisted in defense that it was the duty of the servants of the railroad company to dump Jose's earth out of the cars; and that they had no authority to employ Jose's men to assist them; and that Jose's men were trespassers in attempting to do so; and that, being trespassers, the railroad company owed them no duty, and was under no obligation to protect them against the carelessness of its servants.

It is undoubtedly true that, if one who has no interest in the work to be performed, a mere bystander, voluntarily assists the servants of another, either with or without the latter's request, he must do so at his own risk; and the jury were so instructed in this case. But it is equally well settled that one who has an interest in the work to be performed, and for his own convenience, or to facilitate or expedite his own work, assists the servants of another, at their request or with their consent, is not thereby deprived of his right to be protected against the carelessness of the other's servants. In the former class of cases, the master will not be responsible; in the latter, he will be. This distinction is sustained by every text-book to which our attention has been called, and is well sustained by adjudged cases.

Thus, in *Degg* v. *Midland R. Co.*, 1 Hurlst. & N. 773, where a mere bystander, without any request from the servants of the railway company, volunteered to assist them in working a turnable, and was carelessly injured by the servants of the company, the court held that he had no remedy against the company; and this case is approvingly cited in *Osborne* v. *Knox & L. Railroad*, 68 Me. 49, 28 Am. Rep. 16.

But in *Wright* v. *London & N. W. R. Co.*, L. R. 10 Q. B. 298, where the consignee of a heifer assisted in moving the car in which she had been brought, in order to hasten her delivery, and was carelessly run against and hurt, the court held that he had a remedy against the company; that the rule established in the *Degg Case* did not apply. To the same effect is *Holmes* v. *North-Eastern R. Co.*, L. R. 4 Exch. 254, L. R. 6 Exch. 123.

So, in this country, in *McIntire Street R. Co.* v. *Bolton*, 43 Ohio St. 224, 54 Am. Rep. 803, where a passenger on a street-railway car assisted in backing the car onto the track at a turnout, and was carelessly run against and hurt, the court held that the railway company was responsible, because the assistance rendered tended to expedite the passenger's journey, and prevented his being regarded as a mere volunteer.

So, in *Eason* v. *S. & E. T. R. Co.*, 65 Tex. 577, 57 Am. Rep. 606, where, to facilitate the loading of lumber, it became necessary to move a car, and the shipper's servant, at the request of the conductor of the freight train, undertook to make the coupling, and was injured by the carelessness of the company's servants, the court held that the railway company was responsible, that the servant was not a mere volunteer, because the assistance which he undertook to render was to facilitate his own work, and thus promote the interests of his employer. The rule of exemption and its limitations are very clearly stated in this case.

The distinction running through all the cases is this: that, where a mere volunteer—that is, one who has no interest in the work—undertakes to assist the servants of another, he does so at his own risk. In such a case the maxim of *respondeat superior* does not

apply. But where one has an interest in the work, either as consignee or the servant of a consignee or in any other capacity, and, at the request or with the consent of another's servants, undertakes to assist them, he does not do so at his own risk, and, if injured by their carelessness, their master is responsible. In such a case the maxim of *respondeat superior* does apply. The hinge on which the cases turn is the presence or absence of self-interest. In the one case, the person injured is a mere intruder or officious intermeddler; in the other, he is a person in the regular pursuit of his own business, and entitled to the same protection as any one whose business relations with the master exposes him to injury from the carelessness of the master's servants.

This distinction is sustained by the cases cited, and by every modern text-book to which our attention has been called; and we are not aware of a single authority which holds the contrary. The recent case of *Wiscam* v. *Rickards*, 136 Pa. 109, 10 L. R. A. 97, cited by defendant's counsel, is not opposed to it. It sustains it. In that case the plaintiff was hurt while assisting the defendant's servants in unloading a heavy fly wheel from a wagon. The court found, as a matter of fact, that the plaintiff was a mere volunteer, having no interest in the work which he undertook to assist the defendant's servants in performing, and, consequently, that he had no remedy against their master. The court says that the plaintiff had no interest in the delivery of the wheel; that the delivery was not completed, but was going on when the accident occurred, and the delivery was the act of the defendant; that the participation of the plaintiff was not that of an owner receiving his own goods, but was that of a servant assisting the servants of the defendant; and that this circumstance brought the plaintiff's case within the rule of non-liability. "The distinction," said the court, "is refined, but it seems to be substantial, and we feel constrained to recognize it and enforce it." The fact that the plaintiff was a mere volunteer, having no interest in the work which he undertook to assist the defendant's servants in performing, was the hinge on which the case turned, and defeated his right to recover. If the plaintiff had been sent to obtain the wheel, and, at their request or with their consent, had assisted the defendant's servants in unloading it, in order to hasten or facilitate his own work, and had been injured by their negligence, his right to recover would undoubtedly have been sustained. As already stated, the hinge on which the cases turn is the presence or absence of self-interest, or a self-serving purpose. In the one case, he is a mere volunteer; in the other, he is a person in the regular pursuit of his own business,—a distinction very obvious and substantial.

Mr. Beach, in his work on Contributory Negligence (sec. 120), says that where one assists the servants of another, at their request, for the purpose of expediting his own business or that of his master, and he is injured by the servants' negligence, the master is liable; that in such a case the relation of fellow servant does not exist, and in case of injury the rule of "*respondeat superior*" applies.

Mr. Thompson, in his work on Negligence (vol. 2, p. 1045), says that care must be taken to distinguish the case of a mere volunteer from that of one assisting the servants of another, at their request, for the purpose of expediting his own business or that of his master; for in such a case he will not stand in the relation of fellow servant to them, and, if he is injured by their negligence, the doctrine of "*respondeat superior*" will apply, and their master will be responsible.

But in the present case it is urged by the learned counsel for the railroad company that the crew in charge of a gravel train have no authority to make such a request or give such consent as will authorize the servants of the consignee to remove, or assist in the removal of, earth from the cars.

We do not think that such a want of authority exists. It seems to us that the persons having the charge of freight are the very ones to give such consent or to make such a request; and it has been so held, both in England and in this country.

In *Wright's Case*, L. R. 10 Q. B. 298, it was so held. In that case *Mr. Justice* Field said that the agent to deliver freight is the proper person to give consent for the consignee to assist in its delivery. That was the heifer case already referred to.

And in *Lewis* v. *Western R. Corp.*, 11 Met. 509, it was so held. In that case a truckman was permitted by one McCoy to assist in the removal of a block of marble from a car. The truckman was allowed to take the car to the depot of another railroad company, and there, by the use of the latter's derrick, to make the attempt to lift the block of marble from the car, and place it directly on his truck. But the attempt failed. The derrick gave way, and the block of marble fell, and was broken. This brought into litigation, directly and sharply, the authority of these two servants—one a servant of the railroad company, and the other a servant of the consignee—thus to change the place and manner of delivering freight. And precisely the same argument was urged against the authority in that case as is urged against the authority in this case. It was said that McCoy was in no sense a general agent of the railroad company; that his only authority was to receive and deliver freight; that, his authority being thus special and limited, his consent to change the place and manner of delivering the freight was not binding upon the company. But the court held otherwise. The court held that the place and manner of delivering freight may always be changed by the servants of the carrier and the servants of the consignee; that their authority to make such changes is included in their authority to receive and deliver freight; that if the consignee of a bale of goods steps into a car, and asks for a delivery there, and it is passed over to him, the delivery is complete. The rule established by the authorities seems to be this; that the persons having authority to

deliver freight and the persons having authority to receive it may always agree upon the place and manner of its delivery.

In the present case, the evidence tended to show that the railroad company, while engaged in grading a portion of its track in or near Portland, undertook to leave some earth at a point on the line of its road for Mr. Jose. Mr. Jose employed a contractor, by the name of Shannahan, to take the earth away. It appeared in evidence that, at the request of the railroad crew in charge of the gravel train, Shannahan's men had assisted in dumping the earth left for Mr. Jose out of the cars; and on the day of the accident, when Shannahan's men came for more earth, the earth had been left in the cars, and the railroad men had gone on to where they were delivering earth for the use of the railroad. Consequently, Shannahan's men were obliged to dump the earth out of the cars themselves, or wait for an indefinite length of time for the return of the railroad men. It was a cold day in December, and to wait would be neither comfortable for themselves nor profitable for their employer; and so, for their own convenience and to facilitate their own work, Shannahan's men undertook to dump the earth out of the cars themselves. The decedent was one of them. The evidence shows that he was an experienced man at that kind of work. But one of the cars was defective, and had been improperly loaded, and it tipped over, and fell upon him, and inflicted the injuries of which, at the end of about seven months, he died.

The presiding justice instructed the jury that one who voluntarily assists the servants of another cannot recover from the master for an injury caused by the negligence or misconduct of such servants; that one cannot by his officious conduct impose upon the master a greater duty than that which he owes to his own hired servants; that care must be taken, however, to distinguish a mere volunteer from one who assists the servants of another, at their request, for the purpose of expediting his own business or that of his master, for in such a case he will not stand in the relation of a fellow servant to them, and, if injured by their negligence, their master will be responsible; that if the plaintiff (Thomas Welch) consented to assist in dumping the cars, at the request of the railroad crew in charge of the train, to expedite or facilitate the work which he was engaged in performing for Mr. Jose, he could not be regarded as such an intermeddler or volunteer as to preclude him from a recovery on that ground, provided the alleged negligence and injury were made out in other respects; nor could he be regarded as a fellow servant with the employés of the railroad so as to preclude him from a recovery on that ground.

These instructions were several times repeated, and not always in precisely the same words; but such were the substance and effect of the instructions.

Counsel for the railroad company profess to be greatly alarmed at the consequences of such a doctrine. What, they ask, will be the limit of such a power? Where will the line be drawn? And they profess to believe that, if such a power is conceded to the persons in charge of a gravel train, then the engineers of freight and passenger trains may turn over their engines to inexperienced persons and the property and lives of the whole community be put in jeopardy. To thus enlarge and magnify the consequences of a ruling may be an ingenious mode of argument, but we do not think it is sound. It does not follow that, because the crew in charge of a gravel train may allow the servants of a consignee to assist in removing earth from the cars, therefore the engineers of freight and passenger trains may turn over their engines to inexperienced hands. We give no countenance to such a doctrine. Our decision goes no further than to hold that the persons having the charge of freight may allow the servants of the consignee to remove it from the cars, and that the latter, while so engaged, have a right to be protected against the negligence of the former; in other words, that in such cases the rule of "*respondeat superior*" applies. Such a doctrine seems to be well sustained by authority, and we believe it to be sound.

2. We will now consider the motion. It is the opinion of the court that the jury were properly instructed, and that the evidence was sufficient to justify a verdict for the plaintiff; but we think that the damages assessed by the jury ($8,000) were clearly excessive. When one is negligently injured, and he dies immediately, the largest amount recoverable is $5,000. The amount may be less, but never more. If the person injured survives for a considerable length of time, this limitation does not apply, or, rather, did not when this action was tried. What the rule may be under the recent statute (Act 1891, chap. 124) will not now be considered. But we think this statutory limitation, whether applicable to the particular case under consideration or not, is entitled to consideration in determining whether or not a verdict is excessive. The damages recoverable for negligently causing the death of a person must in every case depend largely upon what would probably have been the earnings of the deceased if he had not been killed. Other elements enter into the calculation, but the earning capacity of the deceased is always an important factor. The death of one capable of earning a large income is necessarily a greater loss to his estate than the death of one capable of earning only a small income. The earning capacity of the deceased in this case must have been small. He was not a skilled workman. His only employment had been working in sewers and shoveling gravel. This appears from his own deposition, taken before his death. And notwithstanding he was an unmarried man, and had no one dependent upon him for support, and twenty-three years of age, he had not saved a dollar of his earnings. We feel justified, therefore, in assuming that his earning capacity was small. Possibly, if he had lived, he might, later in life, have developed a capacity for more lucrative employments. Probably not. And, in estimating the loss to his estate caused by his death we must be governed by probabilities, not

possibilities. Probably if the deceased had not been injured, and had lived to the common age of men, he would have left but little, if anything, to his surviving relatives. It seems to us that in such a case the damages recoverable for the benefit of surviving relatives ought to be comparatively moderate; that if, under our law, no more than $5,000 is recoverable for the negligent killing of a skilled workman, capable of earning a large income, when his death is immediate, a verdict of $8,000 for the death of an unskilled workman, capable of earning only a small income, must be regarded as clearly excessive, though, as in this case, he survives his injuries some six or seven months. Influenced by these considerations, we think *a new trial must be granted, unless the administrator remits all over $5,000.* If such a remittitur is entered upon the clerk's docket, the entry will be, motion and exceptions overruled.

Peters, *Ch. J.*, Libbey and Haskell, *JJ.*, dissent.

OREGON SUPREME COURT.

John E. WALLACE, Admr., etc., of Mary Bodaila, Deceased, *Respt.*,
v.
CITY & SUBURBAN R. CO., *Appt.*

(.....Or.....)

1. On a motion for a nonsuit every intendment and every fair and legitimate inference which can arise from the evidence must be made in favor of the plaintiff, and the court must assume those facts as true which the jury could properly find under the evidence.

2. The law demands greater vigilance and care in running an electric street-car over a public street crossing which is much frequented by children going to and returning from school at a time when they may reasonably

---

NOTE.—*Duty imposed on street railroad companies to avoid injuring children on the track.*

I. *Care required of employés.*
  a. *Lookout.*
  b. *Speed.*

II. *Negligence defined.*
  a. *Lookout.*
  b. *Speed.*

III. *Negligence a question for jury.*
  a. *Lookout.*
  b. *Speed.*

I. *Care required of employés.*

a. *Lookout.*

A general rule in regard to the duty of a street railroad company in the operation of its road is, that it is required to exercise ordinary and reasonable care as to lookout ahead, speed of cars, and appliance for controlling same, so as to prevent injuring children on the track or attempting to cross the same. (Age seven years) Stanley v. Union Depot R. Co. 114 Mo. 606; (age two years) Roller v. Sutter Street R. Co. 66 Cal. 230; (age five years) Baltimore & O. R. Co. v. State, 30 Md. 47.

There are some cases in considering the question of care imposed, which require greater vigilance on the part of the driver to anticipate injuring small children likely to be on the track. Affirming the doctrine announced in WALLACE v. CITY & SUBURBAN R. Co. (Age four years) Collins v. South Boston R. Co. 142 Mass. 301, 56 Am. Rep. 675; (tender age) Schierhold v. North Beach & M. R. Co. 40 Cal. 447; (age eight years) Mitchell v. Tacoma R. & Motor Co. (Wash.) June 11, 1894.

So the degree of care required of street-car drivers by law is enhanced by a city ordinance requiring a driver and conductor of a street-car to keep a vigilant watch especially for children. (Age seven years) Fath v. Tower Grove & L. R. Co. 13 L. R. A. 74, 105 Mo. 537.

An instruction that the highest degree of care is required to prevent injury to a helpless child on the track, by a car moving slowly up hill, is error without prejudice, where the driver did not see the child until after accident, although by-standers shouted to him. (Helpless) Giraldo v. Coney Island & B. R. Co. 42 N. Y. S. R. 915.

As to the degree of watchfulness required on the part of the driver some cases require that the driver should be vigilant. Mitchell v. Tacoma R. & Motor Co. and Fath v. Tower G. & L. R. Co. *supra;* (age four years) Mangam v. Brooklyn R. Co. 38 N. Y. 455, 98 Am. Dec. 66.

Others that he should be watchful. Humbird v. Union Street R. Co. 110 Mo. 76.

That he should be alert. (Age seven years) Block v. Harlem Bridge, M. & F. R. Co. 28 N. Y. S. R. 495.

That he should exercise constant watchfulness. (Age two years) Baltimore City Pass. R. Co. v. McDonnell, 43 Md. 534; (age six years) Schnur v. Citizens Traction Co. 153 Pa. 29.

That he should exercise a reasonable outlook. (Age two years) Czezewzka v. Benton-Bellefontaine R. Co. (Mo.) March 24, 1894; (age three years) Winter v. Kansas City Cable R. Co. 6 L. R. A. 536, 99 Mo. 509.

But in Falotio v. Broadway & S. A. R. Co. 9 Daly, 243, it was held that it was error to charge that a street-car driver is bound to exercise the greatest care in the management of the car, and that he must be vigilant in observing the track and in a position to speedily apply the brake, and that no more care was required than of drivers of other vehicles.

As to "Lookout" see also other subheads.

In Sheets v. Connolly Street R. Co., 54 N. J. L. 513, it was held that in an action for injury to a child ten years old from a street-car, the jury have no right to consider the duty of a driver to collect fares as bearing on the question of negligence when there were no passengers from whom to collect fares.

In Etherington v. Prospect Park & C. I. R. Co., 88 N. Y. 641, it was held that the failure to specifically except to the use of the word "extraordinary" vigilance that ought to be used by car drivers, will be a waiver of error.

Where a child suddenly runs in front of a car it is generally held that the driver is required to use ordinary care to prevent injury. Mt. Adams & E. P. R. Co. v. Cavagna, 6 Ohio C. Ct. Rep. 606; (age seventeen months) Chicago West. Div. R. Co. v. Ryan, 131 Ill. 474; (age six years) Welsh v. Jackson County Horse R. Co. 81 Me. 466.

In such a case in Collins v. South Boston R. Co 142 Mass. 301, 56 Am. Rep. 675; and in Humbird v. Union Street R. Co., 110 Mo. 76 (age eight years), it was held that he should handle his car in anticipation of accident liable to children. But see further, Paducah Street R. Co. v. Adkins, *infra.*

See also 28 L. R. A. 486; 29 L. R. A. 287; 32 L. R. A. 340; 33 L. R. A. 122; 44 L. R. A. 127; 45 L. R. A. 169; 46 L. R. A. 457.

be expected to be using the crossing than is demanded at other places.

3. **It is for the jury to judge whether the failure of a school child to look or listen** before attempting to cross a street-car track shows a want of that degree of care which could reasonably have been expected of such a child.

4. **The presumption that a person seen on a street-car track** will leave it before a street-car reaches him cannot be indulged in, when a child of tender years is seen on the track.

(July 30, 1894.)

APPEAL by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by negligence for which defendant was responsible. *Affirmed.*

The facts are stated in the opinion.

Mr. **R. Mallory** for appellant.

Messrs. **McGinn, Sears & Simon,** for respondent:

Booth on Street Railways, section 310, says: "As we have seen, a greater degree of vigilance and caution must be observed in controlling the movements of the car to prevent injuries to children and persons who are known, or appear, to be infirm than is required for the protection of adults not laboring under such disabilities.

An infant, to avoid the imputation of negligence, is bound only to exercise that degree of care which can reasonably be expected of one of its age.

---

b. *Speed.*

As to the speed required, some cases hold that the team or car should always be under control. Schierhold v. North Beach & M. R. Co. 40 Cal. 477; Humbird v. Union Street R. Co. *supra;* (age five years) Pendril v. Second Ave. R. Co. 2 Jones & S. 481.

See further, as to speed, other subheads.

II. *Negligence defined.*

a. *Lookout.*

The failure on the part of the driver or motorman of a street-car to exercise a reasonable degree of care in keeping a vigilant outlook on the track ahead, whereby he might have discovered an infant on the track, or attempting to cross the track, and avoided injuring him, will be held to be negligence. (Age sixteen months) Chicago West. Div. R. Co. v. Ryan, 31 Ill. App. 621; (age nine years) Thurber v. Harlem Bridge, M. & F. R. Co. 60 N. Y. 326; (age six years) Strutzel v. St Paul City R. Co. 47 Minn. 543; (age three years, eight months) Babrenburgh v. Brooklyn City, H. P. & P. P. R. Co. 56 N. Y. 652; (age two years) Citizens Pass. R. Co. v. Costigan (Pa.) 5 Cent. Rep. 525; (age eleven years) Lynch v. Metropolitan Street R. Co. 112 Mo. 420.

And same was held where driver or motorman was careless and looking in another direction. (Age two years) Com. v. Metropolitan R. Co. 107 Mass. 236; (age six years) Mason v. Atlantic Ave. R. Co. 4 Misc. 291, affirmed, 140 N. Y. 657; (age eight years) Dowd v. Brooklyn Heights R. Co. 9 Misc. 279; Stone v. Dry Dock, E. B. & B. R. Co. 115 N. Y. 104, reversing 46 Hun, 184.

The same was held where an ordinance required a vigilant lookout. (Age six years) Senn v. Southern R. Co. 108 Mo. 142; (age eleven years) Hays v. Gainesville Street R. Co. 70 Tex. 602.

But some cases hold that there is no negligence on the part of the employés of a street railroad company where there is a reasonable outlook ahead, and an ordinary rate of speed, and a child appears suddenly in front of the car or runs on the track. This question has been determined in passing upon instructions, or motions for a nonsuit, or motions for a new trial where the evidence did not justify the verdict. (Age five years) Paducah Street R. Co. v. Adkins, 14 Ky. L. Rep. 425; (age three and a half years) Schlenk v. Central Pass. R. Co. 15 Ky. L. Rep. 409; (age three years) Gallaher v. Crescent City R. Co. 37 La. Ann. 288; (age nine years) Dunn v. Cass Ave. & F. G. R. Co. 21 Mo. App. 188; (age ten years) Kennedy v. St. Louis R. Co. 43 Mo. App. 1; (age twelve years) Manahan v. Steinway & H. P. R. Co. 35 N. Y. S. R. 813; (age ten years) Fenton v. Second Ave. R. Co. 126 N. Y. 625, reversing 56 Hun, 99; Cords v. Third Ave. R. Co. 24 Jones & S. 319; (age two and a half years) Citizens Street R. Co. of Ft. Wayne v. Carey, 56 Ind. 396; (age five years) Trumbo v. City Street-Car Co. 89 Va. 780; (age five and a half years) Chilton v. Central Traction Co. 152 Pa. 425; (age two years) Bulger v. The Albany Railway, 42 N. Y. 459.

And in Baker v. Eighth Ave. R. Co. 62 Hun, 39, it was held that the fact that a driver of a horse-car turns his head away from the horses or the front of the car, in the middle of a block where there is no crosswalk, and a child coming from behind a passing car is struck by the horses, is not of itself negligence. See also Moore v. Metropolitan R. Co. *infra;* Mt. Adams & E. P. R. Co. v. Cavagna, *supra.*

The mere fact of injury to a child does not create a presumption of negligence. (Age eight years) Squire v. Central Park, N. & E. R. R. Co. 4 Jones & S. 436; (age three years) Mascheck v. St. Louis R. Co. 3 Mo. App. 600; (age four years) Jaquinto v. Broadway & S. A. R. Co. 2 Misc. 174; and in Philadelphia City Pass. R. Co. v. Henrice, 92 Pa. 431, 37 Am. Rep. 690, it was stated that as a matter of law it is not negligence for a driver not to stop the car if he saw a child sixteen months old in such close proximity that it might reach the track before the car passed; the question is one for the jury, and negligence cannot be inferred from the number of hours work per day required of car employés.

And in Boland v. Missouri R. Co., 36 Mo. 484, it was held that there is no negligence on the part of a street-car driver where a two-year-old child was killed where the driver's attention was directed in another direction anticipating danger, driving slowly and cautiously, with his knee on the dashboard and hand on the brake, and having no reason to expect the proximity of the child, and stopping as soon as possible when its danger was discovered.

And in Hearn v. St. Charles Street R. Co., 34 La. Ann. 160, it was held that a driver of a street-car is not negligent where he stops the car and in pursuance of a city ordinance drives away boys attempting to hang on the car, and returning to his post starts the car, and runs over a child twenty-two months old which had walked under the mule's neck and against the foreleg and which could not be discovered by ordinary diligence.

In Texas in 1884 by statute, a street railroad company was only liable for gross negligence in causing injury to a child by the cars. (Age fourteen months) San Antonio Street R. Co. v. Caillouette, 79 Tex. 341; Dallas City R. Co. v. Beeman, 74 Tex. 291.

In Mack v. Lombard & S. Street P. R. W. Co., 18 Wash. L. Rep. 807, it was held that the striking of a boy by a driver of a street-car causing him to jump in front of a passing car, was not the proximate cause of the injury, and the ques-

Byrne v. *New York Cent. & H. R. R. Co.* 83 N. Y. 620.

In a boy of ten years of age the question as to contributory negligence by crossing the track was a question to be submitted to the jury.

Barry v. *New York Cent. & H. R. R. Co.* 92 N. Y. 290; *McGovern* v. *New York Cent. & H. R. R. Co.* 67 N. Y. 418.

In *Stone* v. *Dry Dock, E. B. & B. R. Co.*, 115 N. Y. 104, it was held that a nonsuit was improperly granted; that the question of contributory negligence should have been submitted to the jury.

See also *Washington & G. R. Co.* v. *Gladmon*, 82 U. S. 15 Wall. 405, 21 L. ed. 114; *Mattey* v. *Whittier Mach. Co.* 140 Mass. 337.

In *Strutzel* v. *St. Paul City R. Co.*, 47 Minn. 543, the court says: "The duty of watchfulness rests upon the driver of a street-car approaching a street crossing where he has reason to suppose that young children may be engaged in coasting or sliding down a neighboring hill, and across the car track, although such conduct on the part of the children is unlawful."

When the situation at the crossing, and the manner of running the train, the number and duties of the employés in charge, the rate of speed, the extent of travel upon the street, and the opportunity for observation, were shown, it was peculiarly for the jury to determine whether the rate of speed was reasonable, and the defendant's management of the train otherwise reasonably prudent.

Bolinger v. *St. Paul & D. R. Co.* 36 Minn. 418.

---

tion of proximate cause is for the court as to undisputed facts.

As to other cases of lookout, see other subheads.

b. *Speed.*

Negligence on the part of the driver or motorman is shown by undue rate of speed and the failure to keep the car well under control, or that the brakes were not in good order, especially at crossings or where a car on an adjoining track is discharging passengers. Quincy Horse R. & C. Co. v. Gnuse, 33 Ill. App. 212, reversed on another point 137 Ill. 264; Hedin v. City & Suburban R. Co. (Or.) July 30, 1894; (age eight years) Silberstein v. Houston, W. Street & P. F. R. Co. 22 N. Y. S. R. 452; (age two years) Farris v. Cass Ave. & F. G. R. Co. 8 Mo. App. 588, 80 Mo. 325; (age five years) Barksdull v. New Orleans & C. R. Co. 23 La. Ann. 180; Reed v. Minneapolis Street R. Co. 34 Minn. 557; (age six years) Chicago City R. Co. v. Robinson, 27 Ill. App. 26, affirmed, 4 L. R. A. 126, 127 Ill. 9; Warner v. Railroad Co. 6 Phila. 537.

As to speed, see also other subheads.

III. *Negligence a question for the jury.*

a. *Lookout.*

The question of negligence is one for the jury if the employés in charge of a street-car fail to use ordinary care to see a small child near the track ahead, or, seeing him, fail to exercise due care to control the car and stop in time to prevent injury. (Age three years) Shenners v. West Side Street R. Co. 78 Wis. 382; (age five years) Mason v. Minneapolis Street R. Co. 54 Minn. 216; (between nine and ten years) Mallard v. Ninth Ave. R. Co. 27 N. Y. S. R. 801; (age five years) Huerzeler v. Central Cross Town R. Co. 139 N. Y. 490; (age four years) Dahl v. Milwaukee City R. Co. 62 Wis. 532.

And in Galveston City R. Co. v. Hewitt, 67 Tex. 473, 60 Am. Rep. 32, it was held that the question of negligence is one for a jury if a street-car driver used all the diligence possible to avoid injury after a child nineteen months old was seen, or ought to have been seen, in front of the car. The driver of a street-car should exercise the highest degree of care, and is not to assume that a child of this age will see the danger and avoid it.

And so the question of proper outlook becomes very material, and where it is shown that this was not kept and a child was thereby injured, the question of negligence is one for a jury. (Age four years) Erie City Pass. R. Co. v. Schuster, 113 Pa. 412, 57 Am. Rep. 471; (age two years eight months) O'Flaherty v. Union R. Co. 45 Mo. 70, 100 Am. Dec. 343; (age seven years) Oldfield v. New York & H. R. Co. 14 N. Y. 310; see 3 E. D. Smith, 103; (age three years two months) Ihl v. Forty-Second Street & G. Street Ferry R. Co. 47 N. Y. 317, 7 Am. Rep. 450; (age three and one half years) Government Street R. Co. v. Hanlon, 53 Ala. 70; (age seven years) Moore v. Metropolitan R. Co. 2 Mackey, 437.

So, if the employé in charge is careless, inattentive, or looking in wrong direction. (Age three years) Anderson v. Minneapolis Street R. Co. 43 Minn. 490; Weissner v. St. Paul City R. Co. 47 Minn. 468; (age five years) Fallon v. Central Park, N. & E. R. R. Co. 64 N. Y. 13; (age three and one half years) Ehrman v. Brooklyn City R. Co. 38 N. Y. S. R. 990; (age four years) Citizens' Pass. R. Co. v. Foxley, 107 Pa. 537; (age two years) Weil v. Dry Dock, E. B. & B. R. Co. 119 N. Y. 147; (age two and one half years) Hyland v. Yonkers R. Co. 22 N. Y. S. R. 100; (age six years) Keenan v. Brooklyn City R. Co. 8 Misc. 601; (age four years) Levy v. Dry Dock, E. B. & B. R. Co. 35 N. Y. S. R. 769; (age four years) Rosenkranz v. Lindell R. Co. 108 Mo. 9.

And in Johnson v. Reading City Pass. Railway, 160 Pa. 647, it was held that it is a question for the jury whether or not a driver could have seen a child twenty months old on the track in time to avoid injuring. In the discharge of his duty to drive with care and look out, he may for an instant turn his head to the sidewalk to look for passengers.

And in McMahon v. Northern Cent. R. Co., 39 Md. 438, it was held that the question of negligence is one for the jury if a freight train in a city, nearly a square long, standing for four hours, is moved by horses without signal or warning or brakeman in his place, and a boy about six years old is injured in crossing.

As to other cases of lookout, see other subheads.

b. *Speed.*

The question of negligence is also one for the jury where the injury to a child results from undue speed of the street-car, or failure of brakes to be in proper order. O'Flaherty v. Union R. Co. 45 Mo. 70, 100 Am. Dec. 343; Oldfield v. New York & H. R. Co. 14 N. Y. 310; see E. D. Smith, 103; Government Street R. Co. v. Hanlon, 53 Ala. 70; Fallon v. Central Park, N. & E. R. R. Co. 64 N. Y. 13; Ehrman v. Brooklyn City R. Co. 38 N. Y. S. R. 990; Citizens' Pass. R. Co. v. Foxley, 107 Pa. 537; Weil v. Dry Dock, E. B. & B. R. Co. 119 N. Y. 147; (age six years) Jetter v. New York & Harlem R. Co. 2 Keyes, 154.

As to other cases of speed, see other subheads.

The cases of injuries received in jumping on or off street-cars, and cases where children on the track were injured but the decision turned solely on contributory or imputed negligence are not included in this note.

Inasmuch as the degree of care required depends largely on the age or helplessness of the child, the age has been given as the cases were cited. L. T.

Bean, *Ch. J.*, delivered the opinion of the court:

This is an action to recover damages for the death of plaintiff's intestate, caused by the alleged negligence of the defendant corporation in the management and operation of one of its electric street-cars on Savier street, in the city of Portland. The negligence charged in the complaint is that a car, while being run and operated recklessly, negligently, and carelessly, and without the exercise of any care and attention, and at an excessive and dangerous rate of speed, ran over and killed the plaintiff's intestate, a child about six years of age, while she was lawfully crossing the track at a public street crossing.

At the close of plaintiff's testimony the defendant submitted a motion for a nonsuit, which being overruled, the trial resulted in a verdict and judgment in favor of plaintiff, from which defendant appeals, and now insists that the court erred in overruling its motion for a nonsuit. The refusal to nonsuit was proper, unless the evidence for the plaintiff taken in its most favorable light, would not authorize the jury to find a verdict in his favor. On a motion for a nonsuit, every intendment and every fair and legitimate inference which can arise from the evidence must be made in favor of the plaintiff, and the court must assume those facts as true which a jury could properly find under the evidence. "Before a court is authorized to grant a nonsuit for insufficiency of evidence," says Lord, *Ch. J.*, "it must appear that, admitting the testimony of plaintiff to be true, and giving him the benefit of every inference that is fairly deducible from it, the plaintiff has still failed to support his action. In fact, it is enough if the evidence offered tends to show facts sufficient to sustain the action, though remotely." *Herbert* v. *Dufur*, 23 Or. 462. The only question we have to determine, then, is whether there was any evidence offered by plaintiff, from which the jury could lawfully find that the death of plaintiff's intestate was caused by the negligence of the defendant in operating its cars at an excessive and dangerous rate of speed.

The main facts may be briefly stated as follows: The defendant's cars run east and west on Savier street, and at or near the intersection of that street with Nineteenth street there is a parish school, which at the time of the accident was attended by the deceased and a number of other children, who were accustomed, as was known to the persons in charge of the car, to use the crossing at which plaintiff's intestate was killed, in going to and from school. A few moments after the school had adjourned for lunch, and while the children were on the street,—some engaged in playing near the track, and others on there way home,—the defendant's car came down Savier street, running, as the evidence for plaintiff tended to show, at the rate of ten miles an hour, and, without slowing down, attempted to pass the crossing: and in doing so the plaintiff's intestate was knocked down by the car, and killed. The particular incidents attending the accident are not fully disclosed, the only eyewitnesses being two boys, aged nine and thirteen years, respectively. The elder boy first stated that he was playing marbles in the street, about ten feet from the track, and saw the car strike the deceased, and two wheels pass over her body, and afterwards testified that she was standing on the crossing, about three feet from the track, while the car was coming down from Twentieth street, and he did not see the car strike her, but saw her fall on the track. The other boy, who is brother of the deceased, says that he and his sister were on their way home from school, and that he had hold of her hand, and while they were crossing the track his sister was struck by the car, and that neither of them saw it, nor did they look to see if a car was coming, and knew nothing of its approach until it struck the girl, when he jumped back.

The contention for the defendant is that this evidence does not in any way tend to show that the excessive or dangerous speed of the car was the proximate cause of the injury, or that it would not have occurred if the car had been running at a rate of speed perfectly safe and legal. If we assume, as does the argument for the defendant, that the child, without the fault or negligence of the defendant, suddenly and unexpectedly appeared on the track immediately in front of the car, we might conclude that her death was an unavoidable accident, and that the rate of speed would be immaterial, for upon such an appearance on the track no precaution could have prevented the accident. But because these facts are not fixed and certain the case had to go to the jury, and the rate of speed properly became an element in the case. The evidence does not show how far in advance of the car the child attempted to cross the track, but it does tend to show that she was on or within three feet of the track, within plain view of the persons in charge of the car, while it was moving from Twentieth street down to the place of the accident, and, notwithstanding such fact, no attempt was made to avoid a collision. It is a well-settled principle that a wrongdoer is responsible for such consequences as might reasonably have been anticipated as likely to occur as the natural and probable result of his misconduct, and it is ordinarily the province of the jury to ascertain whether the injury in a particular case was such natural and proximate result of the wrong complained of. *Hartzig* v. *N. P. Lumber Co.* 19 Or. 522; *Ransier* v. *Minneapolis & St. L. R. Co.* 32 Minn. 331. Now, in this case, the accident occurred at a public street crossing, much frequented by children going to and returning from school, at a time when the children might reasonably be expected to be using the crossing, and therefore the law demanded the greater vigilance and care on the part of those in charge of the car. They saw, or could, by the exercise of reasonable care, have seen, the children on or near the track a sufficient length of time before reaching the crossing to have slowed down and had the car under control, but, in place of doing so, were running at a dangerous rate of speed, as we must assume. In view of the rule that what is ordinary care and what negligence are inquiries to be answered, in most cases, by the jury, we think it cannot be declared, as a matter of law, that it is not negligence in those in charge of an electric street-car,

who see, or can, by the exercise of ordinary care, see, a company of small children on or near the track at a public street crossing, and who they have reason to suppose are crossing the street, to attempt to pass them at the rate of eight or ten miles an hour. It was therefore clearly the province of the jury to ascertain the position of the child while the car was coming down the street, and whether a slower rate of speed would not have enabled the persons in charge of the car to have observed the child on the track in time to avert the accident. There was, then, sufficient evidence for the consideration of the jury, tending to show that the excessive speed of the car was negligence, and the proximate cause of the injury, unless the deceased was guilty of such contributory negligence as would prevent a recovery by her administrator. As a general rule, it is undoubtedly the duty of a pedestrian to look and listen before attempting to cross a street-car track, and a failure to do so will bar a recovery; but this rule is not to be applied inflexibly in all cases, without regard to age or circumstances. If we assume that it can be asserted, as a proposition of law, that a child of the age of the deceased is *sui juris*, so as to be chargeable with negligence, the law is not so unreasonable or unjust as to require of it the same degree of reason and consideration in avoiding the consequences of the negligence of others that is required of persons of full age and capacity; and it should be left to the jury to determine whether the child, in attempting to pass in front of the car, acted with that degree of care and prudence which might reasonably be expected, under the circumstances, of a child of her age and capacity. She was lawfully in the street, and was as much entitled to use the crossing as the defendant corporation. In attempting to do so, she was run over and killed by the car of defendant, running at an excessive and dangerous rate of speed. The negligence of the defendant must therefore be assumed, and it was for the jury to judge whether the child's conduct, in attempting to cross the track in front of the approaching car without looking or listening, was characterized by any want of that degree of care which could reasonably have been expected of a child of her age. *Cusida* v. *Oregon R. & Nav. Co.* 14 Or. 551; *Washington & G. R. Co.* v. *Gladmon*, 82 U. S. 15 Wall. 401, 21 L. ed. 114; *Stone* v. *Dry Dock, E. B. & B. R. Co.* 115 N. Y. 104; *Byrne* v. *New York Cent. & H. R. R. Co.* 83 N. Y. 620; *Matley* v. *Whittier Mach. Co.* 140 Mass. 337; *Philadelphia & R. R. Co.* v. *Long*, 75 Pa. 257; *Pennsylvania R. Co.* v. *Kelly*, 31 Pa. 372; *Barry* v. *New York Cent. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377.

Viewing, then, the case from the standpoint of plaintiff's testimony alone the motion for a nonsuit was properly overruled. Nor do we find any error in the instructions complained of. The statement that the case should receive the same consideration as if the child were living, and had brought an action herself for injuries, is in the opening paragraph of the charge, and, in view of what follows, could not have been intended or understood by the jury as asserting that the same rule for the measure of damages should be applied as if the child had lived, and brought an action for her own injuries. By paragraph 6 the court simply asserts the doctrine that, although the child may have been guilty of negligence in going on the track, yet, if the servants of defendant in charge of the car saw the dangerous position in which she had placed herself, it was their duty to have exercised all the diligence then possible to avoid injuring her. The terms "more than ordinary diligence," and "extraordinary diligence," as used by the court, were intended to define what would constitute ordinary care under the exigencies of the situation. The term "ordinary care" is a relative term, always dependent on circumstances. What would be ordinary care in one case would be the grossest neglect in another. Thus, if an adult should be seen on a street-car track, it might be assumed that he would leave the track before the car reached him, but no such presumption can be indulged in as to the conduct of an infant of tender years; and hence, when the court said that, if the servants of defendant saw this child on the track, they were required to use more than ordinary diligence to prevent injury, it was only in effect saying that the age of the child required the highest degree of care on the part of the servants of the defendant, and nothing short of that would be ordinary care, under the circumstances.

We think, therefore, *the judgment must be affirmed*, and it is so ordered.

NEW YORK COURT OF APPEALS.

Henry J. NEGUS, *Respt.*,
v.
Louis W. BECKER *et al.*, *Appts.*

(143 N. Y. 333.)

1. Carrying up a party wall for a three-story building, as contemplated by the contract under which it was built, although the other party has erected a building only two stories high, does not make the owner of the new building an insurer against injuries which may result to his neighbor's property, or render him liable for a falling of the wall without any negligence on his part.

2. The work of raising a party wall is neither dangerous nor extraordinary in itself so as to make the person for whom it is done liable for negligence of an independent contractor in doing the work.

(October 9, 1894.)

NOTE.—As to the right of one co-owner to carry up a party wall, see *note* to Harber v. Evans (Mo.) 10 L. R. A. 41.

As to the exceptions to the rule that an employer is not liable for the acts of an independent contractor, see *note* to Hawver v. Whalen (Ohio) 14 L. R. A. 823.

See also 33 L. R. A. 294, 564; 36 L. R. A. 382; 37 L. R. A. 146; 40 L. R. A. 345; 44 L. R. A. 482.

APPEAL by defendants from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment of the Cattaraugus County Circuit in favor of plaintiff, in an action brought to recover damages for injuries caused by the fall of a party wall to which defendants were attempting to make an addition. *Reversed.*

Statement by **Gray, J.:**

This action was brought by the plaintiff to recover damages of the defendants for the injury occasioned to him by the falling of a brick wall, which was being erected, or carried up, upon a party wall between their premises. The plaintiff and one Krieger, being owners of adjoining lots of land, made a contract by which the former agreed to erect upon their boundary line a brick party wall with stone foundation, "of suitable size and dimensions to support a three story brick building." When completed, Krieger was to pay to plaintiff one half of the cost of the wall, and thereafter the said wall was to be owned jointly by the parties as a party wall. The plaintiff erected a two story building, and built the party wall of corresponding height. Krieger made payment as required by the contract. Afterwards, Krieger conveyed his lot and his interest in the wall to these defendants, who made a written contract with one Robinson to erect a brick building upon their lot of three stories in height. Under this contract, Robinson was to make use of the party wall, and, to meet the requirements of the new building, was to lengthen it so as to cover a portion of the rear end of the boundary line which plaintiff had failed to build upon, and was also to carry it up to a further height, for the accommodation of the third story. During the process of its construction, that part of the wall which was being carried up fell over upon the roof of plaintiff's building, causing the damage complained of. The complaint alleged that the defendants, in extending the party wall in the rear, and in carrying it up another story, acted "without the knowledge or consent of the plaintiff." It charged no negligence to defendants or to the contractor, and the latter was not made a party to the action. The demand was for a judgment in the amount of the damage sustained by reason of the falling of the wall. Upon the trial there was no dispute about the facts. The defendants were not connected with the work of building, other than through the contract with Robinson, and there was no evidence that the falling of the wall was due to negligence in construction, or that it was not a wall suitably built, and in all respects proper for the purpose. The trial judge denied defendants' motion for a dismissal of the complaint, and granted the plaintiff's motion for the direction of a verdict for the amount of the damages proved. To these rulings defendants excepted, and subsequently appealed to the general term, where the judgment recovered by the plaintiff was affirmed. The defendants then appealed to this court, and the only question argued in their behalf relates to the correctness of the rulings referred to.

Messrs. **Henderson & Wentworth,** for appellants:

If there was any negligence which resulted in the falling of the wall so built by the contractor in carrying up the party wall, it was the negligence of the contractor Robinson only, and not the negligence of the defendants.

Engel v. *Eureka Club*, 137 N. Y. 100; Moak's Underhill, Torts, p. 39; *King* v. *New York Cent. & H. R. R. Co.* 66 N. Y. 181, 23 Am. Rep. 37; *Hexamer* v. *Webb*, 101 N. Y. 377, 54 Am. Rep. 703; *Blake* v. *Ferris*, 5 N. Y. 48, 55 Am. Dec. 304.

The wall was quite as much the defendant's wall as the plaintiff's. It was built at the joint expense of the adjacent lot owners. It was built for a party wall, and the defendants had the same right to build it higher in the construction of the building on their lot of which this party wall was to be a part, that they would have had if the wall had stood wholly upon their lot.

Brooks v. *Curtis*, 50 N. Y. 639, 10 Am. Rep. 545.

An injury arising from inevitable accident is but the misfortune of the sufferer, and lays no foundation for legal responsibility.

Harvey v. *Dunlop*, Hill & D. Supp. 194; *Booth* v. *Rome, W. & O. T. R. Co.* 24 L. R. A. 105, 140 N. Y. 267.

Defendants cannot be made liable to the plaintiff for the damages sued for unless it be shown that the defendants were themselves negligent, or unless it be shown that the work of building the party wall higher which Robinson contracted to do was intrinsically dangerous, or that the same could not be safely done by the contractor in the exercise of due care.

Engel v. *Eureka Club, supra.*

If the falling of the wall complained of was by the act of God,—an inevitable accident—then no foundation exists for legal responsibility to the plaintiff by any one whatever.

Harvey v. *Dunlop*, Hill & D. Supp. 193; *Center* v. *Finney*, 17 Barb. 94; *Bullock* v. *Babcock*, 3 Wend. 391; *Booth* v. *Rome, W. & O. T. R. Co. supra.*

A person in doing that which he has the legal right to do incurs no liability to any one except for negligence.

Bellinger v. *New York Central Railroad*, 23 N. Y. 42; *Reed* v. *State*, 108 N. Y. 407; *Blake* v. *Ferris, supra; Smith* v. *Wagner*, 15 N. Y. Week. Dig. 264; *Brooks* v. *Curtis, supra; Schile* v. *Brokhahus*, 80 N. Y. 614.

Mr. **Hudson Ansley,** for respondent:

It was the appellant's act by or under Robinson increasing the height of this wall which caused the damage. They had contracted for it and caused it to be built, providing, "when the wall reaches the height of the Negus building, the same is to be built on top thereof to the height required," and the action was properly brought against the defendants.

Booth v. *Rome, W. & O. T. R. Co.* 44 N. Y. S. R. 9.

A party wall when built and standing becomes the joint property of the owners, and when once destroyed the easement or right is gone, and there is no easement or right in the wall until built, and all lands not used by the party wall revert to the owner.

Heartt v. *Kruger*, 9 L. R. A. 135, 121 N. Y. 386.

Either proprietor of a party wall may increase the height provided such increase can be made without detriment to the strength of the wall, or to the property of the adjacent owners. "But he does it at his peril."

Brooks v. *Curtis*, 50 N. Y. 639, 10 Am. Rep. 545; *Musgrave* v. *Sherwood*, 23 Hun, 669; McAdam, Land. & T. Supp. 2d ed. 166.

Where one proprietor of a party wall tears it down, he is a trespasser, and liable for all damage.

Schile v. *Brokhahus*, 80 N. Y. 614.

Gray, J., delivered the opinion of the court:

The direction of a verdict for the plaintiff proceeded upon the theory that in undertaking to have the party wall carried up, in order to provide for a third story of their building, the defendants assumed an unqualified liability to the plaintiff for an occurrence, in the course of construction, resulting in injury to him. There is no charge in the complaint, and there was no evidence to show, that the erection of this wall was something intrinsically dangerous, and therefore a matter which imposed upon the defendants a responsibility, in case of resulting damage to their neighbor, from which they could not escape by any plea. The gravamen of the complaint seems to be in the proposition that, because the defendants extended the party wall to the full depth of the boundary line, and carried it higher up, without the plaintiff's knowledge or consent, they did so at their peril, and became absolutely liable, or insurers, for all possible injurious results. In the opinion of the general term upon the authority of *Brooks* v. *Curtis*, 50 N. Y. 639, 10 Am. Rep. 545; and of *Schile* v. *Brokhahus*, 80 N. Y. 619, it was held that it was unnecessary for the claim in the complaint to be pased upon negligence; that, while the defendants had the right to use the wall as they did, they "insured the safety of the operation." "The party making the change," it is said, "is absolutely responsible for any damage which it occasions." We cannot agree with the court below in their view of the question, or that it is controlled by the authorities cited. *Schile* v. *Brokhahus* was an action for trespass in tearing down a portion of a partition wall; and it was tried upon the theory, as *Chief Judge* Church stated, "that the defendant, in disregard of the plaintiff's rights, commenced to tear down the old wall, claiming that it stood entirely upon his own land, and intending to erect a new wall for himself, without giving the plaintiff's property any benefit from it as a party wall; and that this was a trespass which caused the injury complained of." It was upon that theory that the jury found for the plaintiff, and the judgment was affirmed. *Brooks* v. *Curtis* was an action to compel the defendants to remove certain alleged encroachments, which consisted in making additions to the party wall. The plaintiff was held not to be entitled to relief, so far as the carrying up of the wall was concerned; but because, as the roof of the new building was constructed, it caused water, snow, and ice to fall upon the plaintiff's building, the defendants were held to have been properly restrained from maintaining it in that condition. *Judge* Rapallo made the following observation: "We think that the right of either of the adjacent owners to increase the height of a party wall, when it can be done without injury to the adjoining building, and the wall is clearly of sufficient strength to safely bear the addition, is necessarily included in the easement. The party making the addition does it at his peril; and, if injury results, he is liable for all damages. He must insure the safety of the operation; but when safe it should be allowed. The wall is devoted to the purpose of being used for the common benefit of both tenants." The argument is that this language formulated the rule of liability for this case. The respondent in his brief, says: "Under the principle there enunciated, the appellants had a legal right to increase the height of the wall. But this was a conditional, and not an absolute, right. The condition is that he insures the safety of the operation." We think the opinion in *Brooks* v. *Curtis* has been quite misapprehended in deducing from it any such rule of absolute liability, and that the language quoted, which is relied upon as furnishing the rule, should receive no such reading. In connection with the facts, it was appropriate. The "safety" there alluded to, which the building party insures, has reference to the strength of the wall to support the addition, or to the manner of its construction, as furnishing thereafter a possible source of danger or of nuisance to the adjoining owner. It did not mean safety against uncontrollable accidents or the results of some third party's negligence. This is clear from the reading of the balance of the opinion, as well as from a fair consideration of the question.

A party wall is for the mutual convenience and benefit of adjoining property owners, and the only restriction upon its use by either is that that use shall not be detrimental to the other. In this case the wall was the joint property of the parties. It was built for the purposes of a building of three stories in height, and, if the plaintiff did not avail himself of his right to erect a building of such a size, that fact was no obstacle to the defendants building it up, as it had been intended and agreed upon, in order that it might furnish a wall for their own three-story building. They were within the exercise of their legal right in what they did, and it is impossible to see that they assumed any risk in building a wall of the height originally contemplated, so long as they contracted for one of suitable strength, and so adapted as to serve, when built, the purposes of the defendants' new building, without detriment to the enjoyment by the plaintiff of his premises. The plaintiff's agreement bound him to construct a party wall foundation sufficient for the purposes of a three-story building, and he may not complain if the wall is carried up to subserve such a purpose. Had the defendants exceeded the height of three stories, it can then be seen that they might have become insurers of the safety of the wall, for they would have been without the protection of the party-wall agreement, and they would have been undertaking to do a thing which would possibly, if not probably, be hazardous, in view of the limitation as to strength under which the foundation wall was built.

The peculiarity of this case is that there is no question of negligence involved, and for his recovery the plaintiff insists upon the application of the principle that, where one of two persons has sustained damage, the one that has caused it or contributed to it must make it good; or that where an act is done for the benefit of one party, which damages another, the person to be benefited by the act insures the safety of the work, and becomes answerable as an insurer. These principles are inapplicable, and the difficulty with the position is that there is no restriction upon the lawful use by a party of his property, if he proceeds with due care in improving it. The defendants had the conceded right to carry up this wall, of which they were joint owners, for the use of their building, and they provided for its erection in a lawful, proper, and usual way. If there was negligence in the construction of the wall, and its fall could be attributed in any wise to some negligent act of commission or of omission in the process of construction, it is very clear that the party liable for the resulting damage would be the contractor. By the contract between him and these defendants, he undertook to construct the wall. It was not a matter which the defendants were competent to engage in, and in contracting with Robinson they placed themselves in a position which exonerated them from any responsibility for a negligent performance of the work. The performance of the work contracted for was neither dangerous nor extraordinary in itself, and hence the rule would apply that, for an injury resulting to another by reason of a negligent performance, the remedy would be solely against the contractor. The owners were innocent of any act contributing to the injury. We have lately discussed this doctrine in *Engel* v. *Eureka Club*, 137 N. Y. 100, but as it has been already observed, no negligence is charged and the case was left to stand upon the sole proposition that, however innocent the defendants of causing the occurrence, and however lawful their undertaking to build up the party wall, they must nevertheless be responsible for what happened. This cannot be, and is not correct doctrine. If the fall of the wall was through some negligence in its construction, or in securing it, the liability was the contractor's, and not the property owners'. If there was no such negligence, and the fall was occasioned through some accident,—as, for instance, by the extraordinary force of the storm, which is mentioned,—the defendants were not responsible. If, in the lawful use of one's property, injury is occasioned to an adjacent owner, which the exercise of due care could not have prevented, there is no remedy. An illustration of this rule is presented by cases of the excavation of land which deprives adjoining premises of lateral support, *Lasala* v. *Holbrook*, 4 Paige, 170, 3 L. ed. 891, or, more recently, by the case of *Booth* v. *Rome, W. & O. T. R. Co.* 140 N. Y. 267, 24 L. R. A. 105, where the damage was caused by blasting. Here there was damage, admittedly; but there was no wrong. As the complaint was framed, and as the case was tried, the fall of the wall was not laid to the fault of the defendants or of their contractor, and upon such a case plaintiff should have been nonsuited.

It is our judgment that *the judgments below should be reversed*, and that a judgment should be entered in favor of the defendants, dismissing the complaint with costs in all the courts to the appellants.

All concur, except **Andrews, Ch. J.**, not sitting.

Locadie A. V. CASSAGNE
v.
James M. MARVIN *et al.*, Trustees of the United States Hotel at Saratoga Springs.

(143 N. Y. 292.)

1. Certificates representing a pro rata interest in trust property, whether the trust is a technical statutory one or not, on which there is a blank form for transfer and a provision for issuing a new certificate to an assignee, are not, on a bona fide sale thereof, subject to any lien for expenses of litigation, beyond taxable costs, incurred by the trustees in successfully defending a suit by the owner who has paid the judgment for costs before making the transfer.

2. Proceeding upon some erroneous legal theory applied to the facts will not, under Code Civ. Proc., § 1207, defeat plaintiff's right to such relief as the facts may warrant, if it is consistent with the complaint and embraced within the issue.

(October 9, 1894.)

CROSS-APPEALS from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment of a special term for Saratoga County dismissing the complaint in an action brought to compel the transfer of certain trust certificates; the plaintiff appealing from so much of the judgment as dismissed the complaint, and the defendants appealing from so much of the judgment as failed to establish the right of the defendants to recover certain disbursements made by them in defending suits regarding such certificates. *Reversed.*

The facts are stated in the opinion.

Messrs. **Matthew Hale** and **Edgar T. Brackett**, for plaintiff:

The plaintiff wrote to the defendant Marvin a letter. He was then called upon to speak and did speak, recognizing in the broadest manner plaintiff's right to a new certificate, and the plaintiff, in reliance on the promise, paid her money.

An estoppel may arise, although there was no designed fraud on the part of the person sought to be estopped.

Thompson v. *Simpson*, 128 N. Y. 270.

The whole scheme by which a trust was attempted to be formed by the subscribers to the

NOTE.—The facts of the above case are such that others of the same class are not likely to be of frequent occurrence, but in so far as the attempt was made to hold stock liable for the expenses of an unsuccessful suit by its owner the case is likely to be a valuable authority.

so-called subscription agreement, is void and the several certificate holders take title to the property as tenants in common.

If it be a trust to sell, the duty to sell should, in order to be valid, be made imperative. If left discretionary, as it is here, it is not a valid trust under our statute.

The power to rent was merely pending the sale, and as an incident thereto and not as a principal object of the trust, and hence it was void as a trust.

Cooke v. *Platt*, 98 N. Y. 35; *Heermans* v. *Robertson*, 3 Hun, 464, 64 N. Y. 332.

The statute does not authorize a trust to be created for the mere purpose of the sale or the partition of real estate.

Cooke v. *Platt*, *supra*; *Heermans* v. *Robertson*, 64 N. Y. 340, 3 Hun, 464; *Heermans* v. *Burt*, 78 N. Y. 259; *Re Hall*, 24 Hun, 153.

On the purchase the bondholders thereby became owners and tenants in common of the property so purchased, and were, in respect to it, no longer creditors of anybody.

Selden v. *Vermilya*, 3 N. Y. 525; *Purdy* v. *Wright*, 26 N. Y. Week. Dig. 383.

The trust attempted to be created by the deed to the trustees having failed because not authorized by the statute, the deed to them became thereby valid as a power in trust and the title to the property thereupon vested directly in the beneficiaries as the owners thereof under the statute.

1 Rev. Stat. at L. p. 678*m*, §§ 58, 59; *Fellows* v. *Heermans*, 4 Lans. 230; *Cooke* v. *Platt*, 98 N. Y. 35; *Heermans* v. *Robertson*, 64 N. Y. 332, 3 Hun, 464; *Heermans* v. *Burt*, 78 N. Y. 259; *Holly* v. *Hirsch*, 135 N. Y. 590.

They, so far as related to their own shares in the said property, took an absolute title thereto, as they could not be their own trustees in such a case.

Garvey v. *McDevitt*, 72 N. Y. 556; *Hetzel* v. *Barber*, 69 N. Y. 1.

The attempted express trust being void, there is no ground for saying that the defendants held title under "a trust arising or resulting by implication of law."

McArthur v. *Gordon*, 12 L. R. A. 667, 126 N. Y. 597; *Hutchins* v. *Van Vechten*, 140 N. Y. 115.

If the claim for those extra costs and expenses would ever constitute a claim against Mrs. Roche, still such claim had not matured when this action was brought as Mrs. Roche had appealed to the general term from the judgment against her, and that appeal was still pending and undetermined when this action was tried. Hence, the defendants then had no lien or claim against Mrs. Roche herself, for said costs or expenses, and, of course, could have had none against the plaintiff as Mrs. Roche's assignee therefor.

De Figaniere v. *Young*, 2 Robt. 670; Code Civ. Proc. § 502, subdiv. 1; *Canaday* v. *Stiger*, 55 N. Y. 452; *Myers* v. *Davis*, 22 N. Y. 489; *Comstock* v. *Buchanan*, 57 Barb. 127; *Cummings* v. *Morris*, 25 N. Y. 625.

Mr. **Charles S. Lester**, for defendants: No express trust such as can be enforced specifically in equity was created, because no person having authority to dispose of the estate attempted to create such a trust.

Selden v. *Vermilya*, 3 N. Y. 526; *Dempsey* v. *Tylee*, 3 Duer, 97; 1 Rev. Stat. 733 *m*, *p*, § 74.

The plaintiff having made the existence of an express valid trust the foundation of her claim for relief, and having demanded judgment for a specific performance of the alleged trust, cannot have judgment for a different cause of action, and the plaintiff cannot be permitted to deny the title of the trustees.

Hudson v. *Swan*, 83 N. Y. 532; *Paige* v. *Willet*, 38 N. Y. 28; *Tell* v. *Beyer*, 38 N. Y. 161; *Hall* v. *United States Reflector Co.* 30 Hun, 375; *Getty* v. *Hamlin*, 46 Hun, 1; *Crosbie* v. *Leary*, 6 Bosw. 312; *Platt* v. *Stout*, 14 Abb. Pr. 178; *Bruce* v. *Kelly*, 7 Jones & S. 27. See *note* to *New York* v. *Fay*, 23 Abb. N. C. 397; *Arnold* v. *Angell*, 62 N. Y. 508; *Williams* v. *Mechanics & T. F. Ins. Co.* 54 N. Y. 577; *Joslyn* v. *Joslyn*, 9 Hun, 388; *Hurst* v. *Harper*, 14 Hun, 280; *Van Cott* v. *Prentice*, 104 N. Y. 45.

The defendants by the purchase at the foreclosure sale and the conveyance by the referee acquired an absolute title to the premises.

If there is any doubt about the proper construction of the conveyance, the acts of the parties under it may be considered, and if they all agree upon the construction such construction will control.

Nicoll v. *Sands*, 131 N. Y. 24; *Stokes* v. *Reeknagel*, 6 Jones & S. 368; *Woolsey* v. *Funke*, 121 N. Y. 92; *Reading* v. *Gray*, 5 Jones & S. 79.

The acceptance of the certificate operated as an estoppel upon the grantee, and the plaintiff who claims under it cannot deny the truth of the recital that the legal title is in defendants.

Atlantic Dock Co. v. *Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556; *Torrey* v. *Bank of Orleans*, 9 Paige, 649, 4 L. ed. 853.

The words "trustees under a certain subscription agreement dated April 15, 1875, executed by certain persons interested in the United States Hotel bonds," added to the names of the grantees were simply words of description.

Towar v. *Hale*, 46 Barb. 361, approved in *King* v. *Townshend*, 141 N. Y. 364; *Peck* v. *Mallams*, 10 N. Y. 509; *Moss* v. *Livingston*, 4 N. Y. 208; *Buffalo Catholic Inst.* v. *Bitter*, 87 N. Y. 250.

Section 51 of the Statute of Uses and Trusts, which provides that "where a grant for a valuable consideration is made to one person and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee,"—makes the title in the defendants absolute.

Garfield v. *Hatmaker*, 15 N. Y. 475; *Sturtevant* v. *Sturtevant*, 20 N. Y. 39, 75 Am. Dec. 371; *McCartney* v. *Bostwick*, 32 N. Y. 53; *Everett* v. *Everett*, 43 N. Y. 213; *Hurst* v. *Harper*, 14 Hun, 280; *Robertson* v. *Sayre*, 53 Hun, 490.

Sections 58 and 59 apply only to the case of an owner who by deed or will endeavors to create an unlawful trust, and are a declaration of the common-law rule, that property devised to executors upon a void trust does not pass by the devise, but being undisposed of, descends to the heir-at-law.

Digby v. *Legard*, 3 P. Wms. 22, *note 1*; *Pilkington* v. *Boughey*, 12 Sim. 98; *Jones* v. *Mitchell*, 1 Sim. & Stu. 290; *Carrick* v. *Errington*, 2 P. Wms. 361.

Assuming that Marvin and Hall held the absolute title to the premises, it was competent for them to recognize any equitable rights of plaintiff and secure them by a lawful declaration of trust.

Foote v. *Bryant*, 47 N. Y. 544.

But where the owner of land attempts to create an illegal trust and the claim is that this trust is illegal in that the term is not made to depend upon the duration of the life of the beneficiary (*Rice* v. *Barrett*, 102 N. Y. 161; *Beekman* v. *Bonsor*, 23 N. Y. 316, 80 Am. Dec. 269), then sections 58 and 59 of the Statute of Uses and Trusts apply and the trust not being one of the express trusts enumerated in the statute fails and no title or interest passes to the person in whose favor the trust is attempted to be created.

Underwood v. *Curtis*, 127 N. Y. 538.

The defendant Marvin is not estopped by his letter of November 26, 1883, from refusing to issue a new certificate to the plaintiff.

Bush v. *Lathrop*, 22 N. Y. 535; *Union College Trustees* v. *Wheeler*, 61 N. Y. 88; *Ingalls* v. *Morgan*, 10 N. Y. 178.

Assuming, then, that out of the facts of this case equity will apply a trust in favor of the plaintiff to the extent of the amount stated in the certificate and that the defendants hold the legal title in trust for her and others, including themselves, then the usual rights and liabilities arise out of this relation.

Locke v. *Farmers Loan & T. Co.* 140 N. Y. 135; *Hutchins* v. *Van Vechten*, 140 N. Y. 115; *McArthur* v. *Gordon*, 12 L. R. A. 667, 126 N. Y. 597.

The interest of the plaintiff is not a joint interest with others but a several interest.

The defendants are entitled to be reimbursed the expenditures they have made and incurred out of that specific interest, and not out of their own pockets or the interests of other persons.

Young v. *Brush*, 28 N. Y. 673; *Downing* v. *Marshall*, 37 N. Y. 380; *Davis* v. *Stover*, 58 N. Y. 473; *Woodruff* v. *New York, L. E. & W. R. Co.* 129 N. Y. 27.

O'Brien, J., delivered the opinion of the court:

In the year 1875, a mortgage of half a million dollars upon the United States Hotel at Saratoga, given to secure negotiable bonds to that amount then held by various parties, was in process of foreclosure. Judgment was entered in the action, and the property was advertised for sale by a referee for the 1st day of May, 1875. On the 15th day of April, preceding the day appointed for the sale, certain holders of the bonds, in order to prevent a sacrifice of the property, and for the purpose of protecting each other, entered into an agreement in writing with the defendants, who also held bonds, whereby the bondholders signing the instrument constituted the defendants trustees for the protection of their interest in the property. The defendants were thereby authorized as such trustees to purchase the property under the decree, and to hold the legal title thereto as absolute owners, and to sell and convey and incumber the same by mortgage, lease, or otherwise. In case the property was purchased by the trustees, the bondholders subscribing the instrument promised and agreed with the trustees and each other that they would accept and receive the property so purchased, subject to certain chattel mortgages on the personalty, in payment and satisfaction of their shares of the purchase price, and they released the trustees and the referee from all other and further payment. The subscribers also agreed to advance to the trustees sufficient funds to pay off and discharge certain liens upon the property, not extinguished by the judgment, and the interest in the proceeds of the sale of such bondholders as refused to become parties to the agreement. The trustees themselves were holders of bonds, and they were permitted by the agreement, which was not to take effect till holders of bonds to the amount of $400,000 had executed it, to have all the rights in the property, in proportion to their interests, as the others. In pursuance of the agreement, the defendants purchased the property at the referee's sale, and took a conveyance of the same. Afterwards, and on the 10th of May, 1875, the persons who had executed the above-described instrument, including the trustees, signed another paper, ratifying and confirming the trust expressed in the former writing, expressly admitting the validity of the trust, and waiving all matters and things that could impeach or invalidate the same. By virtue of these instruments, the defendants entered upon the care and management of said property, and have ever since continued to act in that capacity. The trustees, under an arrangement with the persons interested in the property held by them, adopted the practice of issuing to each of them a certificate, transferable in form, which, upon its face expressed the interest which the person to whom it was delivered had in the property. In November, 1875, the defendants issued to one Eugenia Roche a certificate, No. 55 of the series, in which it was stated that she was entitled to a beneficial interest in the United States Hotel property at Saratoga, the legal title of which was held by them, amounting to $997, upon the basis that the interest of all the beneficiaries amounted to $454,505, subject to a mortgage lien of $260,000, and that she was entitled to share *pro rata*, with the other beneficiaries in the net rents and profits, and entitled to her proportionate share of the proceeds in case of a sale. There was a printed form on the back of this certificate for the purpose of enabling the holder to transfer the same in the manner in common use with respect to certificates of stock, and a note appended to the effect that a purchaser might receive a new certificate upon the return of this to the trustees, properly assigned. Mrs. Roche was one of the subscribers to the agreement under which the defendants entered into the control and management of the property, and similar certificates were issued by the defendants to the other parties to these agreements for the purpose of showing their respective interests in the property. On No-

vember 24, 1883, Eugenia Roche assigned in due form this certificate to the plaintiff, using for that purpose the printed blank above described, and the plaintiff thereupon requested the defendants to transfer the same upon their books, and to issue to the plaintiff a new certificate upon its surrender, and the defendants, after some correspondence, refused to comply with this request. The plaintiff agreed to pay a valuable and full consideration for the certificate and more than the face value stated thereon, believing that the defendants would transfer the same on the books and issue a new certificate therefor. Some time in the year 1883, Eugenia Roche commenced an action against the trustees defendants to recover a dividend of $79.76, payable on the certificate held by her, as her share of the rents and profits of the property for the previous year. On a trial it was found that defendants had paid the dividend to her agent, and judgment was entered on the action for the defendants, with costs, which were taxed and adjusted at $69.72, January 17, 1884. These costs were paid by the unsuccessful plaintiff in the action. An appeal was taken from this judgment to the general term, and it was there affirmed, with $81.62 costs, May 27, 1885. It has been found by the trial court that the defendants incurred expenses in defending this action, over and above the costs taxed in their favor, in the sum of $254.48, and for defending the appeal, over and above costs, in the sum of $209.60; and they insist that the certificate or interest held by the plaintiff and involved in the litigation is chargeable with such expense. The purpose of this action was to compel the defendants to transfer the interest represented by certificate No. 55, standing on defendants' books in the name of Eugenia Roche, to the plaintiff, who succeeded to her title by the transfer of the certificate on November 24, 1883, and to issue a new certificate in the name of the plaintiff.

The defense, as I understand it, rests upon two propositions: (1) That the trust attempted to be created by the instruments referred to is inoperative and invalid; (2) that the expenses of the litigation between the original owners of the certificate and the defendants, over and above the cost paid, together with the costs of the appeal which are unpaid, are in equity a lien or charge upon the interest represented by the certificate which the defendants are entitled to have paid before transferring the interest on the books or issuing a new certificate. There is no finding that the transfer to the plaintiff of November 24, 1883, was in fraud of any claim which the defendants then had against the original holders of the certificate, or which was in process of ripening into a judgment; and we must therefore assume that on that day the plaintiff, by the execution of the assignment of the certificate, and by the acknowledgment and delivery to her of the same, became vested with the title to that share of the property represented thereby. The certificate was the evidence of the interest which the holder had in the property, and its transfer and delivery by the holder to the plaintiff in the manner prescribed by the trustees transferred the interest in the property. For the purpose of collecting the dividends, and to facilitate the sale of the several interests in the market, a transfer upon the books and a new certificate might be necessary. In the absence of some sufficient reason or excuse, it was the duty of the defendants to sanction the transfer by recording the same on the books and issuing a new certificate to the party to whom the interest had been transferred. This was a duty and obligation which the defendants owed to the bondholders or persons who became severally the beneficial owners of the property which the defendants had in their charge. It was necessarily involved in the relations between the trustees and owners created by the written instruments and the course of business adopted and acted upon by all. The plaintiff agreed to purchase the certificate from the original owner on condition that she could procure a new one in her own name. The correspondence with the defendants was such as to induce her to believe that there would be no difficulty on that point, and then she paid for the certificate a sum considerably larger than its face value. Subsequently the trustees concluded to refuse to make the transfer unless the expenses of the litigation were paid. We do not think that the demand of the plaintiff can be successfully defended upon this ground. When Mrs. Roche paid the judgment for costs awarded against her, she discharged all legal obligations which the defendants had against her, or which they could enforce in any way against her property. In the absence of fraud, she had the right to transfer her interest to the plaintiff on the 24th of November. After that date the defendants' duty to make the transfer and issue the new certificate was to the plaintiff. Concededly, they had no claim of any kind against her, and, whatever their claim against Mrs. Roche might be in law or equity, it did not attach to or pass with the certificate. While it may not be necessary now to decide the question, it seems to me that the expenses of the litigation beyond the costs which the defeated party was adjudged to pay were chargeable to the fund or property in the defendants' hands, and not to the share of the person who instituted the unsuccessful suit. If a stockholder brings an action against the corporation and fails, the payment by him of the judgment for costs puts him in the same relations to it that he had occupied before. The directors could not resist his application to transfer his stock by setting up a claim that the corporation, by reason of the suit, was obliged to pay out large sums for counsel fees and expenses in the litigation which were not covered by the taxable costs.

Nor do we think that it is necessary in this case to determine the nature or character of the trust. It may or may not be a technical statutory trust, but that question does not concern the defendants in the discharge of the obligations and duties which they owe to the certificate holders. It is not material to inquire where the legal title to the property is, whether in the trustees or the bondholders. The defendants are in possession of the property, and in receipt of the rents and profits,

concededly for the benefit of the parties holding the certificates. They occupy towards them fiduciary relations. One of the obligations which they have voluntarily assumed is that they will do certain things to facilitate the transfer from one to another of the certificates which they issued in order to show what interest the holders had respectively in the property, and in order to enable themselves to properly perform the duty of management and care, which includes the distribution and payment to the parties in interest of the rents and profits in the form of dividends. This duty and obligation the defendants do not deny. They admit in the broadest terms that they hold the property and are administering it for the benefit of such bondholders as signed the agreement, and to whom the original certificates were issued, or their assignees. This was the view taken of the case by the court below. So that, whatever view may be taken in regard to the precise legal relations that the defendants bear to the purchased property now held by them, it cannot be denied that by their written agreement, and the practical construction given to it by their own acts, and the course of business adopted by them in the performance of the duties which they assumed, they were under an equitable duty and obligation to furnish to the beneficiaries the certificate containing the evidence of their right. The trustees in the care and management of the property had for many years regularly paid to the original holders of the bonds, or their assignees, dividends from the net rents and profits, and thus their several interests had become the subject of purchase and sale in the market, and the duties of the defendants, from the course of business that had been established under the written instruments, could not well be performed, in the sense that they were understood by all parties, without instituting methods for the transfer of these interests on the defendants' books and to such parties as became the owners of the shares from time to time. This manner of transacting the business, if not fairly to be implied from the agreement, was adopted immediately after the defendants entered into the possession and management of the property, and adhered to for many years; so that now it can fairly be said to be a duty imposed upon the defendants under the written instruments. In short, the relations, duties, and obligations existing between the trustees and beneficiaries at the time of the commencement of this action were analogous to those that exist between the stockholders of a corporation and its directors and officers. The learned trial judge, in his disposition of the case, felt constrained to follow the general term on a former appeal (*Cassagne* v. *Marvin*, 1 N. Y. Supp. 590); but at the same time he recognized the fact that the plaintiff in November, 1883, became the owner in good faith, and for a valuable consideration, of the share of Mrs. Roche, and that she purchased it in reliance, not only upon the established course of business adopted by the defendants themselves, but also upon what was understood as a promise on the part of one of the trustees to make the transfer in the manner required. Finally, the learned counsel for the defendants insists that the complaint in this action is so framed as to give the action the form of one against trustees of an express trust to enforce the specific performance of a duty enjoined upon them as such, and, the trust being void under the statute, the action must fail. This result, we think, does not follow from the premises assumed. Whether the legal title is now in the trustees or the holders of the certificates, the defendants owe certain duties of a fiduciary nature to them, which a court of equity may properly enforce. It may be true that the plaintiff brought this action upon the theory that the trust was valid; but all the facts are alleged and found; and, if they entitle the plaintiff to any relief, the fact that she proceeded upon some erroneous legal theory applied to the facts will not defeat her right to such relief as the facts may warrant, if it is consistent with the complaint and embraced within the issue. Code, § 1207. The defendants do not deny or repudiate any of their obligations as expressed in the writings or created by the course of business. They simply claim that this particular certificate holder, on account of what had occurred before she purchased it and subsequently is not entitled to have the transfer made upon the books as to a new certificate.

As we think that this position is untenable, for the reasons stated, *the judgment must be reversed, and a new trial granted;* costs to abide the event.

All concur, except **Andrews**, *Ch. J.*, not sitting, and **Finch**, *J.*, not voting.

Ernest St. George LOUGH *et al.*, *Appts.*,
v.
A. Emilius OUTERBRIDGE *et al.*, *Respts.*

(143 N. Y. 271.)

1. Special freight rates for transportation by ship which are too low to be profitable and are offered by the carrier only at particular periods when a rival vessel is loading and on the single condition of the shipper's stipulation not to ship by the rival vessel cannot be claimed by a shipper who refuses to make such stipulation, but he may be lawfully charged the ordinary reasonable rates for shipment during the same period in which the lower rates are given to those who complied with the condition.

2. The purpose of a carrier to suppress competition does not make it unlawful to offer low rates when a rival vessel is loading to those only who will not ship anything by the latter.

(October 9, 1894.)

APPEAL by complainants from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of a special term for New York County in favor of defendants, in an action brought to

NOTE.—As to common-law right of carrier to discriminate between passengers or shippers, see *note* to Louisville, E. & St. L. Consol. R. Co. v. Wilson (Ind.) 13 L. R. A. 105.

See also 27 L. R. A. 622; 41 L. R. A. 240, 246.

enjoin defendants from charging plaintiffs a higher rate for carrying freight than was charged to other shippers. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Henry W. Hardon** and **Treadwell Cleveland,** with *Messrs.* **Evart, Choate & Beaman,** for appellants:

The defendants as common carriers are bound to treat the plaintiffs and all other shippers upon substantially similar terms for similar services.

Cogge v. *Bernard,* 2 Ld. Raym. 909; *Interstate Commerce Commission* v. *Baltimore & O. R. Co.* 145 U. S. 276, 36 L. ed. 703, 4 Inters. Com. Rep. 92; *Atchison, T. & S. F. R. Co.* v. *Denver & N. O. R. Co.* 110 U. S. 674, 28 L. ed. 294; *Union Pac. R. Co.* v. *Goodridge,* 149 U. S. 690, 37 L. ed. 902; *Messenger* v. *Pennsylvania R. Co.* 36 N. J. L. 407, 13 Am. Rep. 457, reaffirmed in 37 N. J. L. 531; *McDuffee* v. *Portland & R. Railroad,* 52 N. H. 430, 13 Am. Rep. 72; *Baltimore & O. R. Co.* v. *Adams Exp. Co.* 22 Fed. Rep. 404; *Menacho* v. *Ward,* 27 Fed. Rep. 529; *Samuels* v. *Louisville & N. R. Co.* 31 Fed. Rep. 57; *Burlington, C. R. & N. R. Co.* v. *Northwestern Fuel Co.* 31 Fed. Rep. 652; *Kinsley* v. *Buffalo, N. Y. & P. R. Co.* 37 Fed. Rep. 181; *State* v. *Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404; *Chicago & A. R. Co.* v. *People,* 67 Ill. 11, 16 Am. Rep. 599; *Indianapolis, D. & S. R. Co.* v. *Ervin,* 118 Ill. 255; *Illinois Cent. R. Co.* v. *People,* 121 Ill. 318; *Sanford* v. *Catawissa, W. & E. R. Co.* 24 Pa. 378, 64 Am. Dec. 667; *Audenreid* v. *Philadelphia & R. R. Co.* 68 Pa. 378, 8 Am. Rep. 195; *Stewart* v. *Lehigh Valley R. Co.* 38 N. J. L. 505; *State* v. *Delaware, L. & W. R. Co.* 40 N. J. L. 55, 57 Am. Rep. 543; *New England Exp. Co.* v. *Maine Cent. R. Co.* 57 Me. 188, 2 Am. Rep. 31; *Scofield* v. *Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 54 Am. Rep. 846; *State* v. *Cincinnati, N. O. & T. P. R. Co.* 7 L. R. A. 319, 47 Ohio St. 130; *Fitzgerald* v. *Grand Trunk R. Co.* 13 L. R. A. 70, 3 Inters. Com. Rep. 633, 63 Vt. 169; *Cook* v. *Chicago, R. I. & P. R. Co.* 9 L. R. A. 764, 3 Inters. Com. Rep. 383, 81 Iowa, 551; *Louisville, E. & St. L. Consol. R. Co.* v. *Wilson,* 18 L. R. A. 105, 132 Ind. 517.

The English statutes expressly provide against discrimination in rates for the same service.

The English statutes are not new legislation, but are merely declaratory of the common law.

Messenger v. *Pennsylvania R. Co., Scofield* v. *Lake Shore & M. S. R. Co.* and *McDuffee* v. *Portland & R. Railroad, supra;* 1 Wood, Railway Law, ed. 1894, § 195, p. 639.

In *Diphwys Casson Slate Co.* v. *Festiniog R. Co.,* 2 Nev. & Macn. Eng. Ry. Cas. 73, it was held that an agreement to give exclusive patronage was not a sufficient ground for discrimination.

The rates charged to different shippers may not be the same and yet be lawful—there may be a difference which is not an unlawful discrimination, not unjust because the expense of carriage may be greater in one case than another. But the expense of carriage furnishes the final test. And so it is held that if it costs no more proportionately to carry a small quantity of goods than a large quantity, any discrimination in the freight rate in favor of the larger shipper is unlawful.

Hays v. *Pennsylvania Co.* 12 Fed. Rep. 309; *Kinsley* v. *Buffalo, N. Y. & P. R. Co.* 37 Fed. Rep. 181; *Louisville, E. & St. L. Consol. R. Co.* v. *Wilson,* 18 L. R. A. 105, 132 Ind. 517; *Baxendale* v. *Great Western R. Co.* 1 Nev. & Macn. Eng. Ry. Cas. 200; *Harris* v. *C. W. R. Co.* 1 Nev. & Macn. Eng. Ry. Cas. 97, *note.*

It is for the court to determine the reasonableness of any regulation.

1 Wood, Railway Law, § 297.

Mr. **Wilhelmus Mynderse,** with *Messrs.* **Butler, Stillman & Hubbard,** for respondents:

A carrier has a right to reduce its usual rates in favor of particular consignors, provided it exacts from no shipper more than a reasonable rate.

Wood, Railway Law, p. 566; *Fitchburg R. Co.* v. *Gage,* 12 Gray, 393; *Sargent* v. *Boston & L. R. Corp.* 115 Mass. 422; *Eclipse Towboat Co.* v. *Pontchartrain R. Co.* 24 La. Ann. 1.

In declaring the obligations of the carriers the courts either base their decisions specifically upon the fact that the carrier owes a public duty through the franchises and powers acquired by him under the railway acts, or when not referring specifically to such fact they cite as the authority for their opinions those cases in which such decision was made.

Hays v. *Pennsylvania Co.* 12 Fed. Rep. 309; *Dinsmore* v. *Louisville, C. & L. R. Co.* 2 Fed. Rep. 465.

Even under the law applicable to carriers upon railroads and canals the plaintiffs have no foundation for their case.

Wood, Railway Law, 566; *Fitchburg R. Co.* v. *Gage, supra.*

Without raising the rates against any one, the defendant company made a concession to those giving their business to its company on that particular sailing in preference to the El Callao.* The concession was made at a loss. It was a gift or a legitimate inducement, not in any way violating the rules of public policy.

Mogul S. S. Co. v. *McGregor,* L. R. 21 Q. B. Div. 544, affirmed L. R. 23 Q. B. Div. 598, and affirmed by House of Lords [1892] App. Cas. 25.

A common carrier may justly make a reduction from its customary rates in favor of the public, at stated times and subject to stated conditions, provided it does not exact unreasonable rates from any shipper.

Evershed v. *London & N. W. R. Co.* L. R. 3 Q. B. Div. 135.

O'Brien, J., delivered the opinion of the court:

The question presented by this appeal is one of very great importance. It touches commerce, and, more especially, the duties and obligations of common carriers to the public at many points. There was no dispute at the trial, and there is none now, with respect to the facts upon which it arises. In order to present the question clearly, a brief statement of these facts becomes necessary. The plaintiffs are the surviving members of a firm that, for many years prior to the transaction upon which the action was based, had been engaged in business as commission

merchants in the city of New York, transacting their business mainly with the Windward and Leeward Islands. The defendant the Quebec Steamship Company is a Canadian corporation, organized and existing under the laws of Canada; and the other defendants are the agents of the corporation in New York, doing business as partners. The business of the corporation is that of a common carrier, transporting passengers and freight for hire upon the sea and adjacent waters. For nearly twenty years prior to the transaction in question, a part of its business was the transportation of cargoes between New York and the Barbadoes and the Windward Islands, the other defendants acting as agents in respect to this business. During some years prior to the commencement of this action, the company had in its service a fleet of five or six of the highest class iron steamers, sailing at intervals of about ten days from New York to the islands, each steamer requiring about six weeks to make the trip. The steamers were kept constantly engaged in this service and sailed regularly upon schedule days without reference to the amount of cargo then received. The regular and standard rate charged for freight up to December, 1891, from New York to Barbadoes, one of the Windward Islands, was 50 cents per dry barrel of five cubic feet, which was taken as the unit of measurement, and the tariff of charges was adjusted accordingly for goods shipped in other forms and packages. In December, 1891, the regular rate was reduced from 50 to 40 cents per dry barrel. About this time the British steamer El Callao, which had for some years before sailed between New York and Ciudad Bolivar, in South America, transporting passenger and freight between these points, began to take cargo at New York for Barbadoes, and sometimes to other points in the Windward Islands which she passed on her regular trips to Ciudad Bolivar, sailing from New York at intervals of five or six weeks. Her trade with South America was the principal feature of her business, but such space as was not required for the cargo destined for the end of the route was filled with cargo for the islands which lay in her regular course. The defendants evidently regarded this vessel as a somewhat dangerous competitor for a part of the business, the benefits of which they had up to this time enjoyed; and, for the purpose of retaining it, they adopted the plan of offering special reduced rates of 25 cents per dry barrel to all merchants and business men in New York who would agree to ship by their line exclusively during the week that the El Callao was engaged in obtaining freight and taking on cargo. The plaintiffs' firm had business arrangements with and were shipping by that vessel; and in February, 1892, they demanded of the defendants that they receive 3,000 barrels of freight from New York to Barbadoes, and transport the same at the special rate of 25 cents per barrel upon one of its steamers. The defendants then informed the plaintiffs that the rate of 25 cents was allowed by them only to such shippers as stipulated to give all their business exclusively to the defendants' line, in preference to the El Callao, and that to all other shippers the standard rate of 40 cents per dry barrel was maintained, but they further informed the plaintiffs that, if they would agree to give their shipments for that week exclusively to the defendants' line, the goods would be received at the 25 cents rate. The plaintiffs, however, were shipping by the other vessel, and declined this offer. Again, in the month of May, 1892, the El Callao was in the port of New York taking on cargo, as was also the defendants' steamer Trinidad. The plaintiffs then demanded of the defendants that they receive and carry from New York to Barbadoes about 1,760 dry barrels of freight at the rate of 25 cents. The defendants notified the plaintiffs that a general offer had that day been made by them to the trade to take cargo for Barbadoes on the Trinidad, to sail on June 4th, at 25 cents per dry barrel, under an agreement that shippers accepting that rate should bind themselves not to ship to that point by steamers of any other line between that date and the sailing of the Trinidad. The defendants offered these terms to the plaintiffs, but, as they were shipping by the rival vessel, the offer was declined. Except during the week when the El Callao was engaged in taking on cargo, the defendants have maintained the regular rate of 40 cents to all shippers between these points; and, when it reduced the rate as above described, exactly the same rates, terms, and conditions were offered to all shippers, including the plaintiffs, and carried freight for other parties at the reduced rates only upon their entering into a stipulation not to ship by the rival vessel. After the plaintiffs' demand last mentioned had been refused, they obtained an order from one of the judges of the court in this action requiring the defendants to carry the 1,760 barrels, and the defendants did receive and transport them, in obedience to the order, at the rate of 25 cents; but this order was reversed at general term. The plaintiffs demand equitable relief in the action to the effect, substantially, that the defendants be required and compelled by the judgment of the court to receive and transport for the plaintiffs their freight at the special reduced rates, when allowed to all other shippers, without imposing the condition that the plaintiffs stipulate to ship during the times specified by the defendants' line exclusively.

Whether the regular rate of 40 cents, for which it is conceded that the defendants offered to carry for the plaintiffs at all times without conditions, was or was not reasonable, was a question of fact to be determined upon the evidence at the trial; and the learned trial judge has found as matter of fact that it was reasonable, and that the reduced rate of 25 cents granted to shippers on special occasions, and upon the conditions and requirements mentioned, was not profitable. This finding, which stands unquestioned upon the record, seems to me to be an element of great importance in the case, which must be recognized at every stage of the investigation. A common carrier is subject to an action at law for damages in case of refusal to perform its duties to the public for a reasonable com-

pensation, or to recover back the money paid when the charge is excessive. This right to maintain an action at law upon the facts alleged, it is urged by the learned counsel for the defendants, precludes the plaintiffs from maintaining a suit for equitable relief such as is demanded in the complaint. There is authority in other jurisdictions to sustain the practice adopted by the plaintiffs (*Watson* v. *Sutherland*, 72 U. S. 5 Wall. 74, 18 L. ed. 580; *Menacho* v. *Ward*, 27 Fed. Rep. 529; *Toledo, A. A. & N. M. R. Co.* v. *Pennsylvania Co.*, 54 Fed. Rep. 741, 19 L. R. A. 395; *Coe* v. *Louisville & N. R. Co.* 3 Fed. Rep. 775; *Vincent* v. *Chicago & A. R. Co.* 49 Ill. 33; *Scofield* v. *Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 54 Am. Rep. 846), though I am not aware of any in this state that would bring a case based upon such facts within the usual or ordinary jurisdiction of equity. So far as this case is concerned, it is sufficient to observe that it is now settled by a very general concurrence of authority that a defendant cannot, when sued in equity, avail himself of the defense that an adequate remedy at law exists, unless he pleads that defense in his answer. *Cogswell* v. *New York, N. H. & H. R. Co.* 105 N. Y. 319; *Mentz* v. *Cook*, 108 N. Y. 504; *Ostrander* v. *Weber*, 114 N. Y. 95; *Dudley* v. *Third Order of St. Francis Conv.* 138 N. Y. 460; *Truscott* v. *King*, 6 N. Y. 147.

When the facts alleged are sufficient to entitle the plaintiff to relief in some form of action, and no objection has been made by the defendant to the form of the action in his answer or at the trial, it is too late to raise the point after judgment or upon appeal. So that, whatever objections might have been urged originally against the action in its present form, the defendants must now be deemed to have waived them. This court will not now stop to examine a minor question that does not touch the merits, but relates wholly to the form in which the plaintiffs have presented the facts and demanded relief, or to the practice and procedure. The time and place to raise and discuss these questions was at or before the trial, and, as they were not then raised, the case must be examined and disposed of upon the merits. The defendants were engaged in a business in which the public were interested, and the duties and obligations growing out of it may be enforced through the courts and the legislative power. *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77; *People* v. *Budd*, 117 N. Y. 1, 5 L. R. A. 559. In England these duties are, to a great extent, regulated by the Railway and Canal Traffic Act (17 & 18 Vict. chap. 31), and by statute in some of the states, and in this country, so far as they enter into the business of interstate commerce, by act of congress. The solution of the question now presented depends upon the general principles of the common law, as there is no statute in this state that affects the question, and the legislation referred to is important only for the purpose of indicating the extent to which business of this character has been subjected to public regulation for the general good. There can be no doubt that at common law a common carrier undertook generally, and not as a casual occupation, to convey and deliver goods for a reasonable compensation as a business, with or without a special agreement, and for all people indifferently; and, in the absence of a special agreement, he was bound to treat all alike in the sense that he was not permitted to charge any one an excessive price for the services. He has no right in any case while engaged in this public employment to exact from any one anything beyond what under the circumstances is reasonable and just. 2 Kent, Com. 13th ed. 598; Story, Bailm. §§ 495, 508; 2 Parsons, Cont. 175; *Killmer* v. *New York Cent. & H. R. R. Co.* 100 N. Y. 395, 53 Am. Rep. 194; *Root* v. *Long Island R. Co.* 114 N. Y. 300, 4 L. R. A. 331, 2 Inters. Com. Rep. 576. It may also be conceded that the carrier cannot unreasonably or unjustly discriminate in favor of one or against another where the circumstances and conditions are the same. The question in this case is whether the defendants, upon the undisputed facts contained in the record, have discharged these obligations to the plaintiffs. There was no refusal to carry for a reasonable compensation. On the contrary the defendants offered to transport the goods for the 40 cents rate, and we are concluded by the finding as to the reasonable nature of that charge. The defendants even offered to carry them at the unprofitable rate of 25 cents, providing the plaintiffs would comply with the same conditions upon which the goods of any other person were carried at that rate. What is reasonable and just in a common carrier in a given case is a complex question, into which enter many elements for consideration. The questions of time, place, distance, facilities, quantity, and character of the goods, and many other matters must be considered. The carrier can afford to carry 10,000 tons of coal and other property to a given place for less compensation per ton than he could carry 50; and, where the business is of great magnitude, a rebate from the standard rate might be just and reasonable, while it could not fairly be granted to another who desired to have a trifling amount of goods carried to the same point. So long as the regular standard rates maintained by the carrier and offered to all are reasonable, one shipper cannot complain because his neighbor, by reason of special circumstances and conditions, can make it an object for the carrier to give him reduced rates. In this case the finding implies that the defendants at certain times carried goods at a loss, upon the condition that the shippers gave them all of their business. Whatever effect may be given to the legislation referred to, in its application to railroads and other corporations deriving their powers and franchises from the state there can be no doubt that the carrier could at common law make a discount from its reasonable general rates in favor of a particular customer or class of customers in isolated cases, for special reasons, and upon special conditions, without violating any of the duties or obligations to the public inherent in the employment. If the general rates are reasonable, a deviation from the standard by the carrier in favor of particular customers, for special reasons not applicable

to the whole public, does not furnish to parties not similarly situated any just ground for complaint. When the conditions and circumstances are identical, the charges to all shippers for the same service must be equal. These principles are well settled, and whatever may be found to the contrary in the cases cited by the learned counsel for the plaintiff originated in the application of statutory regulations in other states and countries. *Fitchburg R. Co.* v. *Gage*, 12 Gray, 393; *Sargent* v. *Boston & L. R. Corp.* 115 Mass. 422; *Mogul S. S. Co.* v. *McGregor*, L. R. 21 Q. B. Div. 544, affirmed L. R. 23 Q. B. Div. 598, and by House of Lords [1892] App. Cas. 25; *Evershed* v. *London & N. W. R. Co.* L. R. 3 Q. B. Div. 135; *Baxendale* v. *Eastern Counties R. Co.* 4 C. B. N. S. 78; *Branley* v. *South Eastern R. Co.* 12 C. B. N. S. 74.

Special favors in the form of reduced rates to particular customers may form an element in the inquiry whether, as matter of fact, the standard rates are reasonable or otherwise. If they are extended to such persons at the expense of the general public, the fact must be taken into account in ascertaining whether a given tariff of general prices is or is not reasonable. But, as in this case the reasonable nature of the price for which the defendants offered to carry the plaintiffs' goods has been settled by the findings of the trial court, it will not be profitable to consider further the propriety or effect of such discrimination. The rule of the common law was thus broadly stated by the supreme court of Massachusetts in the case of *Fitchburg R. Co.* v. *Gage*, *supra*. Upon that point the court said: "The recent English cases, cited by the counsel for the defendants, are chiefly commentaries upon the special legislation of parliament regulating the transportation of freight on railroads constructed under the authority of the government there, and consequently throw very little light upon questions concerning the general rights and duties of common carriers, and are for that reason not to be regarded as authoritative expositions of the common law upon these subjects. The principle derived from that source is very simple. It requires equal justice to all. But the equality which is to be observed consists in the restricted right to charge a reasonable compensation, and no more. If the carrier confines himself to this, no wrong can be done. If, for special reasons in isolated cases, the carrier sees fit to stipulate for the carriage of goods of any class for individuals, for a certain time, or in certain quantities, for a less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without entitling all parties to the same advantage." In *Evershed* v. *London & N. W. R. Co.*, *supra*, *Lord* Bramwell remarked: "I am not going to lay down a precise rule, but, speaking generally, and subject to qualification, it is open to a railway company to make a bargain with a person, provided they are willing to make the same bargain with any other, though that other may not be in a situation to make it. An obvious illustration may be found in season tickets." The authorities cited seem to me to remove all doubt as to the right of a carrier, by special agreement, to give reduced rates to customers who stipulate to give them all their business, and to refuse these rates to others who are not able or willing to so stipulate, providing, always, that the charge exacted from such parties for the service is not excessive or unreasonable. The principle of equality to all, so earnestly contended for by the learned counsel for the plaintiffs, was not, therefore, violated by the defendants, since they were willing and offered to carry the plaintiffs' goods at the reduced rate, upon the same terms and conditions that these rates were granted to others; and, if the plaintiffs were unable to get the benefit of such rate, it was because, for some reason, they were unable or unwilling to comply with the conditions upon which it was given to their neighbors, and not because the carrier disregarded his duties or obligations to the public. The case of *Menacho* v. *Ward*, 27 Fed. Rep. 529, does not apply, because the facts were radically different. That action was to restrain the carrier from exacting unreasonable charges habitually for services, the charges having been advanced as to the parties complaining, for the reason that they had at times employed another line. It decides nothing contrary to the general views here stated. On the contrary, the court expressly recognized the general rule of the common law with respect to the obligations and duties of the carrier substantially as it is herein expressed, as will be seen from the following paragraph in the opinion of *Judge* Wallace: "Unquestionably, a common carrier is always entitled to a reasonable compensation for his services. Hence it follows that he is not required to treat all those who patronize him with absolute equality. It is his privilege to charge less than a fair compensation to one person, or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. Respecting preference in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and, except as thus restricted, he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the common carrier in his relations with the public."

But it is urged that the plaintiffs were in fact the only shippers of goods from New York to Barbadoes by the El Callao, and therefore the condition imposed that the reduced rate should be granted only to such merchants as stipulated to give the defendants their entire business, while in terms imposed upon the public generally, was in fact aimed at the plaintiffs alone. The trial court refused to find this fact, but, assuming that it appeared from the undisputed evidence, I am unable to see how it could affect the result. The significance which the learned counsel for the plaintiffs seems to give to it in his argument is that it conclusively shows the purpose of the defendants to compel the plaintiffs to withdraw their patronage from the other line, to suppress competition in the business, and to retain a monopoly for their own benefit. Conceding that such was the purpose, it is not apparent how any obligation that the defendants owed to the public

was disregarded. We have seen that the defendants might lawfully give reduced rates in special cases, and refuse them in others, where the conditions are different, or to the general public, where the regular rates are reasonable. The purpose of an act which in itself is perfectly lawful, or, under all the circumstances, reasonable, is seldom, if ever, material. *Phelps* v. *Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Kiff* v. *Youmans*, 86 N. Y. 324, 40 Am. Rep. 543. The mere fact that the transportation business between the two points in question was in the hands of the defendants did not necessarily create a monopoly, if the general rates maintained were reasonable and just. It is not pretended that the owners of the El Callao proposed to give regular service to the general public for any less. When the service is performed for a reasonable and just hire, the public have no interest in the question whether one or many are engaged in it. The monopoly which the law views with disfavor is the manipulation of a business in which the public are interested in such a way as to enable one or a few to control and regulate it in their own interest, and to the detriment of the public, by exacting unreasonable charges. But when an individual or a corporation has established a business of a special and limited character, such as the defendants in this case had, they have a right to retain it by the use of all lawful means. That was what the defendants attempted to do against a competitor that engaged in it, not regularly or permanently, but incidentally and occasionally. The means adopted for this purpose was to offer the service to the public at a loss to themselves whenever the competition was to be met, and, when it disappeared, to resume the standard rates, which, upon the record, did not at any time exceed a reasonable and fair charge. I cannot perceive anything unlawful or against the public good in seeking by such means to retain a business which it does not appear was of sufficient magnitude to furnish employment for both lines. On this branch of the argument the remarks of *Lord* Coleridge in the case of *Mogul S. S. Co.* v. *McGregor*, *supra*, are applicable: "The defendants are traders, with enormous sums of money embarked in their adventure, and naturally and allowably desire to reap a profit from their trade. They have a right to push their lawful trades by all lawful means. They have a right to endeavor, by lawful means, to keep their trade in their own hands, and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing, by profitable offers, customers to deal with them, rather than with their rivals. It follows that they may, if they see fit, endeavor to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of their profitable offers. I do not think it matters that the withdrawal of the advantages is out of all proportion to the injury inflicted by those who withdraw them on the customers who decline to deal exclusively with them dealing with other traders." The courts, I admit, should do nothing to lessen or weaken the restraints which the law imposes upon the carrier, or in any degree to impair his obligation to serve all persons indifferently in his calling, in the absence of a reasonable excuse, and for a reasonable compensation only; but to hold, as we are asked to in this case, that the plaintiffs were entitled to have their goods carried by the defendants at an unprofitable rate, without compliance with the conditions upon which it was granted to all others, and which constituted the motive and inducement for the offer, would be extending these obligations beyond the scope of any established precedent based upon the doctrine of the common law, and would, I think, be contrary to reason and justice.

The judgment of the court below dismissing the complaint was right, and should be affirmed, with costs.

Finch, Gray, and **Bartlett, JJ.**, concur; **Peckham, J.**, dissents; **Andrews, Ch. J.**, not sitting.

NEBRASKA SUPREME COURT.

PHENIX INSURANCE COMPANY, of Brooklyn, *Plf. in Err.*,
v.
OMAHA LOAN & TRUST CO.

(.....Neb.....)

***1. One Crew borrowed of a trust company $4,000, agreeing to repay it in five years,** with semiannual interest. To secure the payment of this debt, Crew executed to the trust company a mortgage upon his real estate. This mortgage provided that Crew should insure the mortgaged property against loss by fire for five years, for the benefit of the trust company. About the date of the mortgage an insurance company issued to Crew a policy insuring the property against loss by fire for five years. This policy contained the following provisions: (a) "If the property be sold or transferred in whole or in part without written

*Headnotes by RAGAN, C.

NOTE.—*Rights given by the attachment of a mortgage slip to an insurance policy.*

So much uncertainty existed in regard to the rights of the parties when insurance was written upon mortgaged property that in many cases the attempt has been made to provide for such cases by means of a special clause attached to or written in the policy.

In some of the states the insurance department has provided a standard form for such clause in the same way that a standard form has been fixed for the policy itself.

In New York the standard mortgage clause is as follows:

"Loss or damage, if any, under this policy, shall be payable to ————, as mortgagee (or trus-

See also 25 L. R. A. 686; 27 L. R. A. 844; 36 L. R. A. 673; 38 L. R. A. 397; 39 L. R. A. 148.

permission in this policy, then, and in every such case, this policy is void." (b) "When the property shall be sold or incumbered, or otherwise disposed of, written notice shall be given the company of such sale or incumbrance or disposal; otherwise, this insurance on said property shall immediately terminate." Attached to this policy, and made part thereof, was a "mortgage slip," as follows: "It is hereby agreed that this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy. It is further agreed that the mortgagee shall notify said company of any change of ownership or increase of hazard which shall come to the knowledge of the said mortgagee, and that every increase of hazard not permitted by this policy to the mortgagor or owner shall be paid for by the mortgagee on reasonable demand, according to the established scale of rates, for the whole term of use of such increased hazard. It is also agreed that whenever, the company shall pay the mortgagee any sum for loss under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, it shall at once be legally subrogated to all the rights of the mortgagee under all the securities held as collateral to the mortgage debt, to the extent of such payment, or, at its option, may pay to the mortgagee the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage and all other securities held as collateral to the mortgage debt; but no such subrogation shall impair the right of the mortgagee to recover the full amount of its claim." The policy, on its issuance, was delivered to the trust company, which retained the possession and title thereof. Crew sold and conveyed the mortgaged property without the written permission of the insurance company, and of which sale the latter had no notice of any kind until after the insured property was destroyed by fire. The trust company learned of the conveyance of the property soon after it occurred, but neglected to notify the in-

---

tee), as interest may appear, and this insurance as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by any occupation of the premises for purposes more hazardous than are permitted by this policy: Provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

"Provided also, that the mortgagee (or trustee), shall notify this association of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of such mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

"This association reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this association shall have the right, on like notice, to cancel this agreement.

"Whenever this association shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that as to the mortgagor or owner, no liability therefor existed, this association shall to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of his claim."

An additional clause has been inserted in the mortgage clause which is now used by some companies. It is known as the full contribution clause and is as follows:

"In case of any other insurance upon the within described property this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee, or otherwise."

In EDDY v. LONDON ASSUR. CO., *post*, 636, some of the policies contained the full contribution clause while others did not.

Most of the mortgage clauses in use conform quite closely to those given above.

The mortgage clause is legal. Westchester F. Ins. Co. v. Coverdale, 43 Kan. 446.

Rights of mortgagee.

The construction of this clause has been quite uniformly favorable to the mortgagee.

It seems to have settled the question that the mortgagee may maintain an action in his own name for the loss sustained by him. Hartford F. Ins. Co. v. Olcott, 97 Ill. 449.

And the mortgagor cannot maintain an action on the policy unless the mortgage debt has been paid, or he has authority from the mortgagee to do so. Westchester F. Ins. Co. v. Coverdale, *supra*.

So in a case in which a bank had an agreement with the insurance company as to all policies assigned to it which was practically the same as the New York mortgage clause, the court held that under such contract the mortgagee was entitled to maintain an action on the policy in its own name. Meriden Sav. Bank v. Home Mut. F. Ins. Co. 50 Conn. 336.

The legal effect of the mortgage clause is that the insurer agrees that in case of loss it will pay the money directly to the mortgagee, and recognizes him as a distinct party in interest. It creates a new contract with the mortgagee. Hastings v. Westchester F. Ins. Co. 73 N. Y. 141.

The acts of the mortgagor will not affect the rights of the mortgagee. Eliot Five Cents Sav. Bank v. Commercial U. Assur. Co. 142 Mass. 142.

The mortgagee is not to be affected by additional insurance taken by the mortgagor. Hartford F. Ins. Co. v. Olcott, *supra*.

The mortgagee is not affected by the mortgagor's obtaining more insurance than the amount permitted, even though the policies are in his possession, or though the insurance is taken out by him at the mortgagor's request. Mutual F. Ins. Co. of New York v. Alvord, 61 Fed. Rep. 754.

The fact that the mortgagee proceeds to make the repairs will not prevent its recovering on the policy, if the insurer never gives notice of its intention to do so. Eliot Five Cents Sav. Bank v. Commercial U. Assur. Co. *supra*.

The policy as to the mortgagee is not avoided by the sale of the property by the mortgagor to a

surance company thereof until after the fire. Prior to the destruction of the insured property by fire the trust company sold and assigned the mortgage debt, guaranteeing the collection and payment thereof, but did not assign the insurance policy, or part with its possession. The mortgage debt was unpaid and not due at the time of the destruction of the insured property. The trust company brought suit against the insurance company to recover the amount of the loss. While this action was pending the mortgage debt matured, and the trust company, in pursuance of its contract of guaranty, paid it off. *Held:* (1) That neither the sale and conveyance of the mortgaged property by Crew without the permission of the insurance company, nor his failure to give the insurance company notice thereof, voided the policy as to the trust company. (2) That the status of the trust company was not that of a mere assignee of the insurance policy issued to Crew, nor that of a person appointed to collect the loss for him; that the policy contained a contract between the insurance company and the trust company separate and independent from the contract between Crew and the insurance company; and that the rights of the trust company could not be made to depend upon Crew's observance of his agreements with the insurance company. (3) That the neglect of the trust company to notify the insurance company of the sale of the mortgaged property did not void the policy as to the trust company.

2. That as by the terms of the insurance policy the loss was made payable to the trust company, and as it owned and held possession of the policy, and had guaranteed the payment of the mortgage debt, the suit was properly brought in its name, although the assignee of the mortgage debt was also a proper party plaintiff.

---

third person, nor by the latter's taking out additional insurance; nor is the mortgagee bound to pro rate with the latter policy. City Five Cents Sav. Bank v. Pennsylvania F. Ins. Co. 122 Mass. 165.

The mortgagee may furnish the proofs of loss. Graham v. Firemen's Ins. Co. 8 Daly, 421.

But it has been held that the attachment of the mortgage clause to the policy after it has become void because of the acts of the mortgagor and after the mortgagee has entered for breach of condition, will give the mortgagee no rights under the policy. Davis v. German American Ins. Co. 135 Mass. 251.

The clause has no application to the case of a misrepresentation by an agent of a mortgagee as to the owner of the property. And his interest will not be protected in case of such misrepresentation. Graham v. Firemen's Ins. Co. 87 N. Y. 69, 41 Am. Rep. 343.

So if the mortgagee fails to notify the insurer of increase of hazard or change of ownership which came to his attention, the mortgage clause ceases to protect him. Ormsby v. Phœnix Ins. Co. of Brooklyn (S. Dak.) March 3, 1894.

So if the mortgagee applies for a renewal of the policy and fails to disclose increased hazard which has arisen since the original policy was issued and which is known to him, he is not protected by the mortgage clause. Cold v. Germania F. Ins. Co. 99 N. Y. 36.

And in National Bank of D. O. Mills & Co. v. Union Ins. Co. of San Francisco, 88 Cal. 497, although the question was not directly passed upon, it seems to be intimated that failure by the mortgagee to notify the insurer of increase of risk would take away its rights under the mortgage clause.

While the time for redemption has not elapsed, the fact that the mortgagee has bid in the property at foreclosure sale, and credited the amounts of the bid on its debt will not reduce the amount of its debt so as to reduce the amount which the insurer will be compelled to pay under the policy. National Bank of D. O. Mills & Co. v. Union Ins. Co. of San Francisco, *supra*.

Rights of the mortgagor and his grantees.

The mortgagor, after the policy has become void as to him, cannot compel the application of the amount recovered on it in satisfaction of the mortgage. Springfield Fire & Marine Ins. Co. v. Allen, 43 N. Y. 389, 3 Am. Rep. 711.

After the policy has become void as to the mortgagor, he cannot acquire any interest under it by taking an assignment from the mortgagee. Lett v. Guardian F. Ins. Co. 52 Hun, 570, 125 N. Y. 82.

If the mortgagor's vendee procures additional insurance with an agreement between both companies as to prorating in case of loss, the mortgagor has no interest in the original policy, because of his liability on the bond, to compel the first insurers to pay the mortgagee the face of their policy free from deduction because of the additional insurance. Phœnix Ins. Co. of Brooklyn v. Floyd, 19 Hun, 267.

After the mortgagor has conveyed the property in violation of the terms of the policy neither he nor his vendee can compel an application of the proceeds of the policy to the satisfaction of the mortgage. Sterling F. Ins. Co. v. Beffrey, 48 Minn. 9.

If the policy is avoided by the act of the owner, a second mortgagee cannot have an interest in the insurance if the insurer has paid the mortgagee's claim and taken an assignment of the mortgage in accordance with the terms of the policy. Allen v. Watertown F. Ins. Co. 132 Mass. 482.

The subrogation clause.

To entitle the insurer to subrogation under the terms of the clause the facts must be such that as against the mortgagor there would be by the terms of the policy an actual exemption from liability. Traders' Ins. Co. v. Race, 142 Ill. 338.

To entitle the insurer to the benefit of the subrogation clause upon tender of the amount of the mortgagee's loss so as to put the mortgagee in default for refusing to assign the mortgage to it, it must make the tender within a reasonable time and before it has compelled the mortgagee to bring suit on the policy. Eliot Five Cents Sav. Bank v. Commercial U. Assur. Co. 142 Mass. 122.

If the clause simply provides that no sale of the property shall affect the right of the mortgagee to recover in case of loss under this policy, without any provision as to the right of subrogation, there can be no subrogation in favor of the insurance company. Graves v. Hampden F. Ins. Co. 10 Allen, 281.

The prorating clause.

A stipulation that in case of other insurance the insurer shall not be liable for a greater proportion of any loss than the sum hereby insured bears on the whole amount of insurance upon the property issued to or held by any person having an insurable interest therein, whether as owner, mortgagee, or otherwise, does not apply in case the same company issues two policies on the same day, one with the mortgage clause, and the other directly to the mortgagor without such clause. Crow v. Greenwich Ins. Co. 66 Hun, 54. H. P. F.

(September 19, 1894.)

ERROR to the District Court for Douglas County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Jacob Fawcett** and **F. H. Sturdevant** for plaintiff in error.

Mr. **Howard B. Smith,** for defendant in error:

The mortgage slip recognizes that a contractual relation exists between the insurer and the mortgagee separate and distinct from the contractual relation between the insurer and the mortgagor.

Hartford F. Ins. Co. v. *Alcott*, 97 Ill. 449; *City Fire Cents Sav. Bank* v. *Pennsylvania F. Ins. Co.* 122 Mass. 165; *Hastings* v. *Westchester F. Ins. Co.* 73 N. Y. 141.

The effect of knowledge on the part of the local agent has repeatedly been adjudicated by this court in cases even where there was an increase of risk. Such cases are, of course, far stronger than the case at bar.

State Ins. Co. of Des Moines v. *Jordan*, 29 Neb. 514.

Policy and good faith require that the persons clothed by the insurance companies with power to examine proposed risks and fill out, receive, and approve applications for insurance shall bind their principals by their acts and knowledge acquired by them.

Springfield Fire & Marine Ins. Co. v. *McLimans*, 28 Neb. 846.

The effect of a retention of the premium by an insurance company as a waiver is shown in—

Springfield Fire & Marine Ins. Co. v. *McLimans, supra; Dwelling House Ins. Co.* v. *Weikel*, 33 Neb. 669.

The fact that plaintiff was a guarantor is conclusive evidence that it had an insurable interest.

New England Fire & Marine Ins. Co. v. *Wetmore*, 32 Ill. 221; *Warren* v. *Davenport F. Ins. Co.* 31 Iowa, 464, 7 Am. Rep. 160; *State* v. *Farmers & M. Mut. Ben. Asso. of Lincoln*, 18 Neb. 273; *Cone* v. *Niagara F. Ins. Co.* 60 N. Y. 619; *Power* v. *Ocean Ins. Co.* 19 La. 28, 36 Am. Rep. 665; *Morrison* v. *Tennessee Marine & F. Ins. Co.* 18 Mo. 262, 59 Am. Dec. 305, *note; Strong* v. *Manufacturers Ins. Co.* 10 Pick. 40, 20 Am. Dec. 507, 510, 511, note entitled "Insurable Interest in Property;" 1 May, Ins. 3d ed. § 76, p. 128,—definition of insurable interest; Wood, Fire Ins. 2d ed. p. 613,—definition of insurable interest; Richards, Ins. (1892) § 26; *Grable* v. *German Ins. Co.* 32 Neb. 645.

The action was properly brought in the name of the defendant in error.

Waring v. *Indemnity F. Ins. Co.* 45 N. Y. 606, 6 Am. Rep. 146; *New York L. Ins. Co.* v. *Bonner*, 11 Neb. 169; *Hunt* v. *Mercantile Ins. Co.* 22 Fed. Rep. 503; *Gardinier* v. *Kellogg*, 14 Wis. 605; *Scantlin* v. *Allison*, 12 Kan. 85; *Stoll* v. *Sheldon*, 13 Neb. 207; *Roberts* v. *Snow*, 27 Neb. 425.

The actual knowledge of the transfer by the agent, his oral assent thereto, the surrender of a valuable consideration by Mrs. Platter to Mr. Crew, the failure of the agent then to tender back the rebate premium, and the failure of the company to refund any portion of the premium since it learned of the loss,—are a waiver, and the company is now estopped to deny that there is a waiver.

Schoneman v. *Western Horse & Cattle Ins. Co.* 16 Neb. 404; *Western Ins. Co.* v. *Scheidle*, 18 Neb. 495; *Springfield Fire & Marine Ins. Co.* v. *Winn*, 5 L. R. A. 841, 27 Neb. 649; *Carrugi* v. *Atlantic F. Ins. Co.* 40 Ga. 135, 2 Am. Rep. 567; *Amazon Ins. Co.* v. *Wall*, 31 Ohio St. 628, 27 Am. Rep. 533.

Ragan, C., filed the following opinion:

The Omaha Loan & Trust Company, hereinafter called the "trust company," sued the Phenix Insurance Company of Brooklyn, N. Y., hereinafter called the "insurance company," in the district court of Douglas county, to recover the value of certain property destroyed by fire, and insured by the insurance company. The trust company had judgment, and the insurance company brings the case here for review. The material facts in the case are: In February, 1886, one Nathaniel S. Crew was the owner of a tract of land in Buffalo county, Neb., on which were situate a barn and some other buildings. In said month of February, Crew and his wife borrowed of the trust company $4,000, and, as an evidence thereof, executed and delivered to the trust company their coupon bond payable to the order of the trust company five years after February 1st, with interest payable semiannually, and secured the same by a first mortgage on their said real estate. By the terms of this mortgage, Crew and his wife agreed to insure, and keep insured for five years, the buildings on their real estate, for the benefit of the trust company. On the 3d day of March, 1886, the insurance company issued the policy sued on, insuring the buildings of Crew on his real estate against loss or damage by fire for a period of five years. The policy contained the following clauses: (a) "If the property be sold or transferred in whole or in part without written permission in this policy, then, and in every such case, this policy is void." (b) "When the property shall be sold or incumbered, or otherwise disposed of, written notice shall be given the company of such sale or incumbrance or disposal; otherwise, this insurance on said property shall immediately terminate." Attached to this policy, and made a part thereof, was also what is known and called among insurance men a "mortgage slip," which contained the following: "Phenix Insurance Co. of Brooklyn, N. Y. Loss, if any, payable to Omaha Loan & Trust Company, of Omaha, Neb., mortgagee, or its assigns, as its interests may appear. It is hereby agreed that this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy. It is further agreed that the mortgagee shall notify said company of any change of ownership or increase of hazard which shall come to the knowledge of the said mortgagee, and

that every increase of hazard not permitted by this policy to the mortgagor or owner shall be paid for by the mortgagee on reasonable demand, according to the established scale of rates, for the whole term of use of such increased hazard. It is also agreed that whenever the company shall pay the mortgagee any sum for loss under this policy, and shall claim that as to the mortgagor or owner no liability therefor existed, it shall at once be legally subrogated to all the rights of the mortgagee under all the securities held as collateral to the mortgage debt, to the extent of such payment; or, at its option, may pay to the mortgagee the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage and all other securities held as collateral to the mortgage debt; but no such subrogation shall impair the right of the mortgagee to recover the full amount of its claim. Date, March 3, 1886. John H. Roe, Agent." The policy, with the mortgage slip attached, upon its issuance, was delivered to the trust company, and has ever since been owned and held by it. The bond and mortgage executed by Crew to the trust company was in April, 1886, by it sold and assigned to one Huey, the trust company guaranteeing the collection of the principal and the prompt payment of the coupons of said mortgage loan. On the 1st day of April, 1886, Crew and wife sold and conveyed their real estate to one Platter. For the purposes of this case, we take it as established by the evidence that no notice, written or otherwise, of this conveyance, was given to the insurance company, either by Crew or Platter or the trust company, though the latter knew thereof soon after it occurred, until after the property insured had been destroyed, which occurred on the 27th day of April, 1889. On the 12th day of October, 1889, the insurance company having refused to pay the loss, the trust company brought this suit; and on the 1st day of February, 1891, in pursuance of its contract of guaranty with Huey (the mortgage loan being due on that date) paid off and took up the mortgage loan, and owned and held it at the date of the trial of this case (December 30, 1891); the amount at that date due and unpaid on the loan being about $3,000, such amount being largely in excess of the value of the insured property destroyed by fire. To reverse the judgment rendered in this case, counsel for the insurance company make three arguments in this court:

1. It is contended that, as Crew sold and conveyed the premises on which was the insured property without the written consent of the insurance company to such sale being indorsed on the policy, and as neither Crew nor Platter furnished the insurance company any written notice of such conveyance, the policy had become void, and was not in force, even as to the trust company, at the time of the loss sued for. This argument is based upon the theory that the right of the trust company depends upon the observance of the stipulations of the policy by Crew; that the trust company cannot enforce the policy if Crew could not. But we do not agree with this contention. The trust company is not here as the mere assignee of the insurance policy issued to Crew, nor is it here simply as the person appointed to collect the loss for Crew. We are not concerned in this case with the question as to whether Crew has forfeited his right to enforce the policy. It may be that, by reason of his sale of the property without the written permission of the insurance company thereto indorsed on the policy, so far as he is concerned, the policy from that moment ceased to be of any effect. It may be that, by reason of the failure of Crew and Platter to give written notice to the insurance company of the conveyance of the property to Platter, neither of them can enforce the policy. However this may be, it does not follow that because Crew, by his conduct, has precluded himself from enforcing the policy, therefore the trust company has. As we view it, the insurance company, by its policy, agreed with Crew to insure his property, on certain terms and conditions, and, in case it was destroyed by fire, to make good the loss and damage. But this is not all the insurance company agreed to do in this policy. It also, in this policy, contracted and agreed with the trust company that it would pay to it or its assigns whatever loss or damage the insured property might suffer from fire within the life of the policy. This contract with the trust company was a separate and independent contract from the one entered into between Crew and the insurance company, and the right of the trust company to enforce it does not depend upon whether Crew has kept his engagements with the insurance company.

In *Hastings* v. *Westchester F. Ins. Co.*, 73 N. Y. 141, the facts were: Stout and husband executed a mortgage to Hastings for $14,000, and on the same day the insurance company issued to Mrs. Stout a policy of insurance on the mortgaged property, insuring it for three years in the sum of $10,000. This policy contained a provision that in case any other insurance should be taken out on the insured property the assured should be entitled to recover of the Westchester Company no greater proportion of the loss sustained than the sum insured by it bore to the whole amount of insurance effected on such property. The policy also contained a provision that the loss, if any, should be payable to Hastings, the mortgagee, and the policy also contained a provision almost identical with the one contained in the mortgage slip attached to the policy in suit. After this policy was issued, Mrs. Stout procured $4,000 additional insurance on the property. The insured property was destroyed by fire, the loss amounting to $9,822.52. Hastings, the mortgagee, and to whom the loss under the Westchester policy was payable, claimed the entire amount of this loss from that company. The Westchester Company resisted this, claiming that, by reason of the additional insurance procured on the property by Mrs. Stout, it was only liable for 4/7 of the total loss. Miller, J., delivering the opinion of the court of appeals of New York, said: "It is claimed, however, by the appellant's counsel, that the policy was

an insurance of the interest of the owner of the property solely; that such owner was the assured, and the defendant only agreed to make good the loss of such owner, and inasmuch as another policy existed at the time in favor of such owner, although entirely unknown to both the plaintiffs and the defendant, the latter was entitled to the benefit of the condition contained in this policy, which declares that in case of any other insurance . . . the assured is entitled to recover no greater proportion of the loss sustained than the sum insured bears to the whole amount insured thereon. This position cannot, I think, be maintained. Prior to the time when the mortgage clause was entered upon the policy, the word 'assured' referred to the owner, and it is hardly to be assumed that the mortgagees would have accepted such a provision if there was any reason to suppose that they would be affected by any prior insurance. They would, no doubt, have demanded a separate policy as mortgagees, instead of trusting to the hazard and uncertainty of pursuing a remedy upon a policy of which they had no knowledge, and against a company to which they were strangers, and in regard to whose responsibility they had no information whatever. The legal effect of the mortgage clause was that the defendant agreed that in case of loss it would pay the money directly to the mortgagees, and they were thus recognized as a distinct party in interest. It created a new contract from that time with the mortgagees, the terms of which most clearly indicate that it had no relation to the application of the condition referred to. The insurance had been to the owner, and the additional provisions, which were incorporated in the policy by the mortgage clause, created a distinct contract with the mortgagees. It was an independent agreement, partaking in no sense of the character of an assignment of a policy of insurance, but one in which the mortgagees were recognized as a separate party, having distinct rights, and entitled to receive the full amount of insurance money, without any regard whatever to the owner of the property. The meaning of the word 'assured' has not been changed by the addition of the mortgage clause, the object of which evidently was to protect the mortgagees against the effect of the provision in which the word is employed. The interest of the latter was distinct and separate when this change in the policy was made, and the intention of the parties was, beyond question, to insure the plaintiffs under a new contract. Any different interpretation would lead to great injustice, and place the mortgagees under the control and at the mercy of the owner, by changing the character of the defendant's liability, which might operate to prevent the indemnity which the defendant intended to provide. If the condition referred to was in force either before or after the arrangement, the owner might effect other insurance, and thus jeopard the rights, if not entirely control the security, of the plaintiffs." All that is said by Miller, J., in the *Westchester Case*, is applicable to the case at bar. In this case the insurance company, by the mortgage slip, stipulated that the rights of the trust company should not be invalidated by any act or neglect of the mortgagor or owner of the insured property. Reading the entire policy together, the only reasonable construction that can be placed upon it is that it was never the intention of the insurance company or of the trust company that the rights of the latter should be made in any manner to depend upon any act or omission of Crew, the mortgagor and original owner of the insured property.

In *Westchester F. Ins. Co.* v. *Coverdale*, 48 Kan. 446, a policy substantially like the one in controversy here was considered by the supreme court of Kansas; and in deciding the rights of a mortgagee to whom, by a mortgage slip attached to the policy, the loss was made payable, that court said: "The mortgage clause [slip] created an independent and a new contract, which removes the mortgagees beyond the control of the effect of any act or neglect of the owner of the property, and renders such mortgagees parties who have a distinct interest, separate from the owner, embraced in another and a different contract. The tendency of the recent cases is to recognize these distinctions and thus protect the rights of the mortgagee, when named in the policy, and the interests of the owner and of the mortgagee are regarded as distinct subjects of insurance." In *City Five Cents Sav. Bank* v. *Pennsylvania F. Ins. Co.*, 122 Mass. 165, the supreme court of Massachusetts had under consideration a policy substantially like the one in suit, and, in discussing the rights of a mortgagee to recover on the policy notwithstanding the violation of its terms by the owner, said: "But the [insurance] company has made a special contract with the plaintiff, by the fair construction of which we think it is entitled to recover the whole loss proved in this case, it being less than its debt. The [insurance] company has agreed that 'no sale or transfer of the property hereby insured shall vitiate the right of the mortgagee to recover in case of loss.' A necessary consequence of a sale and transfer of the property is that the purchaser has a right to insure his interest. Such right is an incident of his ownership. The object of the special stipulation which the mortgagee took care to procure was to secure the insurance of its interest as mortgagee, and to avoid its defeat by any sale or transfer of the property; and, by a fair interpretation of the contract, it means that its right to recover shall not be vitiated by any of the natural consequences or incidents of a sale or transfer. Otherwise, the stipulation is of very slight value to the mortgagee." In *Hartford F. Ins. Co.* v. *Olcott*, 97 Ill. 439, the facts were: The owner of property procured a policy of insurance on the buildings thereof in his own name, for his own benefit, and for the benefit of a bank to which he owed a debt secured by a mortgage on the insured property. This mortgage required the owner to insure the property for the benefit of the bank. The policy provided that in case of loss the insurance company should pay the amount of it to a trustee named in the mortgage, for the benefit of the bank or the holder of the note. The policy

also provided that the owner might procure additional insurance, but that in case he did so, and loss occurred, he should not be entitled to recover of the Hartford Insurance Company any greater proportion of the loss than the amount insured by its policy bore to the whole sum insured. The policy also provided that in case of loss, and a failure of the insurance company and the insured to agree upon the amount thereof, the controversy should be submitted to arbitration. There was a mortgage clause or mortgage slip attached to the policy, containing substantially the provisions of the mortgage slip made a part of the policy in controversy here. The owner of the property procured additional insurance thereon. A loss occurred, and the owner and the insurance company arbitrated the amount thereof. The insurance company having refused to pay the amount of loss to Olcott, the trustee in the mortgage held by the bank, this suit resulted. The supreme court of Illinois decided that the owner and the bank held distinct interests under the policy, it being in substance two contracts; that the owner, in a suit on the policy for a loss, would be limited to a recovery of a *pro rata* share of the company, when prorated with the amounts of the subsequent policies, and would be bound by his act of submitting the amount of damages to appraisal, but the bank, in a suit by it or its trustees, would not be limited to a recovery of the insurance company's prorated share, with the other companies issuing the subsequent policies, nor would it be bound by the selection of appraisers in which it did not join, and that it had no control over the acts of the mortgagor, and was not bound by his acts or neglect.

In the case at bar, if the trust company was suing simply as the assignee of Crew, then its right to recover would depend upon whether Crew could recover, or if, by the insurance policy, the trust company had been named as a party to whom the loss should be paid, as the agent or trustee of Crew, then its right to recover would depend upon whether Crew could enforce the policy. But the trust company does not stand in either of these relations in this case. It had an interest in the assured property, in that it had a lien upon it, and stands here to enforce rights of its own under the contract between it and the insurance company.

2. As already stated, one of the terms of the policy, or the mortgage slip made a part thereof, was that the trust company would notify the insurance company of any change of ownership of the insured property, or increase of hazard thereto, which should come to the knowledge of the trust company. The trust company learned of the conveyance of the property by Crew to Platter soon after it occurred, but neglected to notify the insurance company thereof. The second argument of counsel for the insurance company is that, because of the failure of the trust company to notify the insurance company of the change of ownership of the insured property, the trust company has lost its right to enforce the policy. It is not claimed that the transfer of the property in any manner increased the hazard of the risk. So we have the question as to whether the neglect of the trust company to notify the insurance company that Crew had conveyed the property worked a forfeiture of the rights of the trust company to enforce the policy. The policy does not provide when the mortgagee shall give this notice, nor is there any provision in the policy or mortgage slip to the effect that in case the mortgagee comes into possession of knowledge that the hazard of the risk has been increased, or that the property has been conveyed, and neglects to notify the insurance company thereof, the policy shall therefore be void. We are not prepared to say that such a provision could be enforced if it was contained in the policy. There is no claim here on the part of the insurance company that it has suffered any injury or damage by reason of the neglect of the trust company in this respect. The insurance company has received a premium for carrying this risk for five years, and we do not think that it should be allowed to escape compliance with its contract because the trust company has neglected to perform an immaterial promise on its part, and which neglect of the trust company has worked no injury whatever to the insurance company. *Hastings* v. *Westchester F. Ins. Co.* 73 N. Y. 141.

3. The third point relied upon by counsel for the insurance company for reversing this case is that this suit was not brought in the name of the real party in interest. We have already seen that the policy contained a separate and independent contract between the insurance company and the trust company, and that the trust company had an interest in the insured property. By the terms of this contract the policy, when issued, was delivered to the trust company, and it has never parted with its possession or the title to it since. "Where, by a policy of fire insurance, the loss is made payable to a third person as his interest may appear, the language imparts an interest in the property in such third person to the extent of his interest. The insurance is for his benefit, and he or his assignee may maintain an action upon the policy in case of loss." *Pitney* v. *Glens Falls Ins. Co.* 65 N. Y. 6. In this case Crew, had he never conveyed the insured property, could not have maintained an action against the insurance company to recover this loss, at least without showing that he had paid and discharged the mortgage debt. *Westchester F. Ins. Co.* v. *Coverdale*, 43 Kan. 446. At the time the suit was brought, Huey, the owner of the mortgage debt, may have been a proper party plaintiff, but that question was not raised in the court below, and is not raised here. Furthermore, Huey, by assigning the mortgage debt to the trust company during the pendency of the action, parted with all his interest, if he had any, in the subject-matter of this action and disqualified himself from being a party thereto. The trust company, by assigning the mortgage debt to Huey, did not thereby assign him the insurance policy, nor part with its interest in it, nor its right to enforce it. As the trust company guaranteed the collection

and payment of the mortgage debt, it still had such an interest in the insured property as entitled it, in case of a loss, to sue for a recovery, and at the time the judgment was rendered the only party that could have maintained this action was the trust company. *Blackwell* v. *Miami Valley Ins. Co.* 48 Ohio St. 533, 14 L. R. A. 431; *Cone* v. *Niagara F. Ins. Co.* 60 N. Y. 619; *Weed* v. *Hamburg-Bremen F. Ins. Co.* 133 N. Y. 394; *Westchester F. Ins. Co.* v. *Coverdale*, *supra*.

There is no error in the record, and *the judgment of the district court is affirmed.*

NEW YORK COURT OF APPEALS.

Fred C. EDDY, Receiver of the Syracuse Screw Company,
v.
LONDON ASSURANCE CORPORATION, *Appt.*,
and
Giles EVERSON, *Respt.*
(And Six Other Cases.)

(143 N. Y. 311.)

1. A mortgagee may properly proceed to judgment and sale in a foreclosure suit which was pending when a loss by fire occurred, unless payment of his mortgage debt is made, under a policy stipulating that his interest in the insurance shall not be invalidated by foreclosure, although it also provides for subrogation of the insurer to his rights under the mortgage with a proviso that it shall not impair his right to recover the full amount of his claim.

2. A provision that a mortgagee's interest in a policy of insurance shall not be "invalidated" by any act of the owner means that it shall not be injuriously "impaired or affected" thereby, and prevents the reduction of his recovery on account of other insurance taken without his knowledge by reason of a provision that the insurer shall be liable only in proportion that the sum insured by the policy bears to the whole amount of insurance issued to or held by any party or parties having an insurable interest.

3. Invalid insurance taken by the owner of property in violation of a policy cannot be reckoned in determining the recovery of a mortgagee, where the policy provides that his interest shall not be invalidated by any act of the owner, although it provides generally that the insurer shall be liable only for its proportion of the loss according to the whole amount of insurance on the property.

(October 9, 1894.)

APPEAL by the defendant insurance company from a judgment of the General Term of the Supreme Court, Fourth Department, modifying and affirming as modified a judgment entered in the office of the clerk of Onondaga county, in favor of defendant Everson, in an action brought to recover the amount alleged to be due on certain policies of fire insurance upon property in which Everson had an interest as mortgagee. *Affirmed.*

The facts are stated in the opinion.

Mr. **A. H. Sawyer**, for appellants:

The defendant insurance companies upon payment to the defendant Everson of the amount due under their policies of insurance were entitled to be subrogated, to the extent of such payment, to all the rights of Everson, as mortgagee, under all securities, held by him as collateral to the mortgage debt, as such securities existed on the day when the loss occurred.

Springfield Fire & Marine Ins. Co. v. *Allen*, 43 N. Y. 389, 3 Am. Rep. 711; *Ulster County Sav. Inst.* v. *Leake*, 73 N. Y. 161, 29 Am. Rep. 115; *Foster* v. *Van Reed*, 70 N. Y. 19, 26 Am. Rep. 544; *Excelsior F. Ins. Co.* v. *Royal Ins. Co. of Liverpool*, 55 N. Y. 343, 14 Am. Rep. 271; *Kip* v. *Mutual F. Ins. Co.* 4 Edw. Ch. 86, 6 L. ed. 807; *Connecticut F. Ins. Co.* v. *Erie R. Co.* 73 N. Y. 399, 29 Am. Rep. 171; *Dick* v. *Franklin F. Ins. Co. of Philadelphia*, 81 Mo. 103.

The agreement on the part of the insurance company to pay in case of loss is concurrent with the agreement upon the part of the mortgagee to subrogate the company, on such payment, to the extent thereof, to all his rights under securities held by him for the payment of the mortgage debt, and the defendant Everson the mortgagee, having by foreclosure of the mortgages and the sale of the property subsequent to the fire, put it out of his power to subrogate the insurance companies to the rights which he had under such securities at the time of the fire, he cannot recover in this action against the defendants, the insurance companies.

Lett v. *Guardian F. Ins. Co.* 52 Hun, 570, affirmed, 125 N. Y. 82; *Fayerweather* v. *Phenix Ins. Co.* 6 L. R. A. 805, 119 N. Y. 324; *Dilling* v. *Draemel*, 30 N. Y. S. R. 435, 16 Daly, 104; *Niagara F. Ins. Co.* v. *Fidelity Title & Trust Co.* 123 Pa. 516; *Carstairs* v. *Mechanic's & Traders' Ins. Co. of New York*, 18 Fed. Rep. 473; *Sussex County Mut. Ins. Co.* v. *Woodruff*, 26 N. J. L. 541; May, Ins. 2d ed. § 458; *Thomas* v. *Montauk F. Ins. Co.* 43 Hun, 218.

The contract of insurance being one of indemnity merely where the interest of a mortgagee is specially insured as such, the insurer would on payment of the loss to the mortgagee, be entitled by law, irrespective of any agreement, to be subrogated to that extent to all securities held by the mortgagee for the payment of the debt.

Sussex County Mut Ins. Co. v. *Woodruff*, *supra*; *Ætna F. Ins. Co.* v. *Tyler*, 16 Wend. 397, 30 Am. Dec. 90.

Where the language of a contract is susceptible of two interpretations, that interpretation must be adopted that will give force and validity to the contract.

Archibald v. *Thomas*, 3 Cow 284.

The language employed in a contract of in-

NOTE.—For construction of the mortgage clause, see note to the case immediately preceding this one.

See also 27 L. R. A. 614; 36 L. R. A. 673.

surance must be taken in the ordinary, popular sense unless it appears to have been used in a technical sense or custom or usage has impressed a different meaning upon it.

Springfield Fire & Marine Ins. Co. v. *Allen*, 43 N. Y. 394, 3 Am. Rep. 711.

Mr. **Watson M. Rogers**, with *Messrs.* **Waters, McLennon & Waters**, for respondent:

The mortgage clause provides for the payment of the loss to Everson as his interest may appear, "and this insurance as to the interest of the mortgagee (or trustee), only, thereon shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property." This furnishes a complete answer by him to the defense mentioned.

City Fire Cents Sav. Bank v. *Pennsylvania F. Ins. Co.* 122 Mass. 165.

The "other insurance" with which the mortgagee must share is such as runs to and is upon the insurable interest held by him; not insurance upon other interests and in favor of other parties.

Adams v. *Greenwich Ins. Co.* 9 Hun, 45; *Crow* v. *Greenwich Ins. Co.* 66 Hun, 54; *Titus* v. *Glens Falls Ins. Co.* 81 N. Y. 410; *Lowell Mfg. Co.* v. *Safeguard F. Ins. Co.* 88 N. Y. 591.

The mortgagee clause constitutes an independent contract between the insurance company and the mortgagee, and enables him to recover, notwithstanding a violation of the conditions of the policy by the owner.

Hastings v. *Westchester F. Ins. Co.* 73 N. Y. 141; *Eddy* v. *London Assur. Corp.* 65 Hun, 207.

The mortgagee may make any contract with the insurer for the protection of his interests so far as they do not impair the rights of the mortgagor.

Ulster County Sav. Inst. v. *Leake*, 73 N. Y. 161, 29 Am. Rep. 115; *Foster* v. *Van Reed*, 70 N. Y. 19, 26 Am. Rep. 544.

He may collect the amount due on the policy, notwithstanding the property undestroyed is sufficient to pay the mortgage debt.

Excelsior F. Ins. Co. v. *Royal Ins. Co. of Liverpool*, 55 N. Y. 344, 14 Am. Rep. 271.

Under the subrogation clause the company is only entitled to subrogation when it "shall pay the mortgagee."

The mortgagee must in any event be paid "the full amount of his claim."

Independently of the contract, the insurer has only an equitable right to be subrogated *pro tanto* to such rights as the insured himself has in respect to the mortgagee after receiving payment of the loss.

Kernochan v. *New York F. Ins. Co.* 17 N. Y. 428.

There must first be complete compensation.

Beach, Mod. Eq. Jur. § 818; Wood, Ins. § 496, p. 1073, and cases cited.

If the insurance companies desire the benefit of subrogation, either upon the principles of the common law or upon the agreement contained in the policy, they must first pay the mortgagee's debt, assert their right of subrogation, and themselves enforce the judgments which they have thus paid and as to the mortgagee, extinguished.

First Nat. Bank of Buffalo v. *Wood*, 71 N. Y. 405, 27 Am. Rep. 66; *Platt* v. *Brick*, 35 Hun, 121, and cases cited at p. 124.

Cases where the mortgagee has merely pursued the prescribed remedy to collect, and has obtained only part of his debt, come within the rule that neither omission of an act not specially enjoined by law, nor the commission of an act expressly authorized by law, is a discharge.

3 Wait, Act. & Def. 227; *Lamsden* v. *Leonard*, 55 Ga. 374; Brandt, Suretyship, § 200.

Peckham, J., delivered the opinion of the court:

The plaintiff commenced the above action against the corporation defendant upon a policy of fire insurance issued by the company by which plaintiff, as receiver, was insured against loss or damage by fire on certain property situated in Syracuse, and formerly owned by the screw company, of that city. The defendant Everson was insured in the same policy as mortgagee, as his mortgage interest might appear. He was joined as defendant, in order that the whole controversy might, as between all the parties, be settled at once. Actions were also commenced against several other insurance companies by the plaintiff, as receiver, at the same time, and to recover upon policies covering substantially the same premises. The questions arising affect generally all the insurance companies, although one or two of such questions are not raised in all the policies. The plaintiff failed to recover, and his complaint was dismissed in the courts below because of the violation of provisions in the policies in regard to procuring other insurance without the companies' consent, and also because of the plaintiff's permitting foreclosure proceedings to be commenced to foreclose certain mortgages upon the insured premises. The plaintiff has not appealed. The defendant Everson and the corporations defendant served cross-answers upon each other, Everson contending that he should be allowed to recover from the companies to the extent of his policies upon his mortgage interest in the premises, while the companies set up several defenses to such claim, which will be noticed hereafter. The cases were referred for trial, and the referee reported in favor of Everson as against the insurance companies, and the judgments were affirmed at the general term of the supreme court after a slight modification as to the amounts of the recovery, and the insurance companies have appealed to this court.

The only questions to be determined arise between defendant Everson and the companies. By the judgment entered upon the report of the referee it is provided in all cases that the insurance companies on making payment of the loss are entitled to be subrogated to the rights of the mortgagee, but such subrogation is not to impair the mortgagee's right to enforce the collection of his claim in full against the principal debtor, nor by means of any collateral security he may hold. This was placed in the judgments in accordance with the reports of the referee.

1. The companies urge that defendant

Everson, the mortgagee, having foreclosed the mortgages upon the premises, and sold the same under his judgment of foreclosure and sale subsequent to the time of the fire, has thereby put it out of his power to subrogate them to the rights which he had under the securities held by him at the time of the fire, and he therefore cannot recover in this action against them. It appears that the Syracuse Screw Company was the original owner of the premises, and it had given three several mortgages thereon,—one dated August 13, 1881, for $4,500; one dated November 3, 1883, for $14,000; another dated June 30, 1885, for $10,000. The defendant Everson, on the 9th day of June, 1888, was the owner of all of these mortgages, and on that day commenced one action against the screw company to foreclose them. On the 23d of June, 1888, the screw company was dissolved, and Eddy was appointed the receiver. The company was wholly insolvent, and had no property other than the mortgaged premises. In July, 1888, Eddy, as receiver, duly appeared in the foreclosure action, and served an answer setting up a defense to the $10,000 mortgage. On the 4th of December, 1888, a fire occurred by which the property covered by the policies was damaged, and appraisers were appointed on the 18th of December, and on the 21st of December, 1888, they made their award by which they determined the damage resulting to the property from the fire to have been $10,102.90. The companies refused to pay Eddy on the grounds already stated. Everson severed his foreclosure action after Eddy put in his answer setting up a defense as to one of the mortgages, and on the 17th of December, 1888, obtained judgment by default for the foreclosure of the $4,500 and $14,000 mortgages, and decreeing a sale of the premises in satisfaction thereof. Subsequent to the fire, and on the 9th of January, 1889, the property was sold under the foreclosure judgment for the sum of $15,400, leaving a deficiency on those two mortgages, including interest and costs, $4,921.86.

Each of the policies of insurance had a provision therein known as the "New York Standard Mortgage Clause," and under it the loss, if any, was made payable to defendant Everson, as his mortgage interest might appear. The clause contained a provision that the insurance of Everson's interest should not be invalidated by any act or neglect of the mortgagor or owner of the property, nor by any foreclosure or other proceedings or notice of sale relating to the property. The clause also contained the further provision that "whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made under all securities held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage, with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of his claim." The companies did claim that, as to the owner of the premises, no liability existed. They never in any manner consented to the institution of foreclosure proceedings. At the time when they were commenced—June, 1888—no fire had occurred, and the defendant Everson was acting strictly within his legal rights when he commenced them. It must be assumed that the commencement of the foreclosure proceedings terminated any interest which Eddy might have had in the policies up to that time. There was, however, a separate and wholly distinct insurance of the interest of Everson in the property, and by the terms of that contract of insurance it was not to be affected by any act or neglect of the mortgagor or owner of the property, or by any foreclosure or other proceedings, or notice of sale relating to the property. The act which forfeited the interest of the owner in a policy was not to affect the interest of the mortgagee. Consequently the mortgagee violated no contract on his part when he commenced the proceedings to foreclose his mortgage, and thus endeavored to collect his debts. Before he had proceeded so far as a judgment of foreclosure, a fire occurred. What was he to do? Was he bound to stay further proceedings, and accept payment of the amount of his insurance, and then assign to the extent of such payment his rights in the mortgages to the companies? We think not. Such is not the meaning of the clause when read as a whole. Foreclosure proceedings were not to affect his rights. This was expressly provided for and agreed to. Although there was an agreement to subrogate, yet that agreement was also upon the condition that subrogation should not impair the mortgagee's right to recover the full amount of his claims. The two rights must be considered together, and, though subrogation, under certain circumstances, may, under the agreement, be insisted upon, yet, unless payment of his mortgage debt is made, the mortgagee must have the right to proceed with the foreclosure and to a sale of the premises, for otherwise it could not be seen whether a subrogation prior to a sale would not impair his right to recover the full amount of the claim of the mortgagee.

If the insurers desired an immediate subrogation, then they had a right, by the terms of their contract, to pay the whole debt, and take an assignment of the bond and mortgage and whatever other securities the mortgagee might have for the payment of his whole claim, otherwise the insurers must wait if the mortgagee desire to continue the foreclosure. The right of the mortgagee to recover his full claim might be pretty sadly impaired if he had to subrogate at once, or, in other words, permit the insurers to collect out of his securities the very amount which they had paid him upon the policies issued to increase his security. It is not the mere right to prosecute which is not to be impaired, but the right to payment in full of

his claim. This is not to be impaired by any claim of subrogation. Here is a very apt case in which to illustrate the point. The mortgagee sustains a loss upon the sale under the foreclosure decree of the two mortgages of nearly $5,000. There is the third mortgage, upon which judgment of foreclosure was obtained, and the amount found due thereon was $12,474, and interest runs on that sum from January 15, 1890. The argument of the companies, if allowed, would lead to their sharing in the amount realized upon the foreclosure sale to the extent of the payments made by them on their policies, some $10,000, and the balance, some $5,000, only would be realized by the mortgagee. In other words, he would receive no benefit whatever from the insurance, for the companies would take out of the proceeds of the foreclosure sale precisely the amount they paid him upon the policies of insurance. What meaning is given to the words in the mortgage clause that no subrogation shall impair the right of the mortgagee to recover the full amount of his claim, if subrogation can be insisted upon under such circumstances? Insurance is taken for the purpose of increasing the security of the mortgagee. By the construction contended for by the companies there is really no such insurance. If the sale under foreclosure amounts only to the total of the insurance, but does not reach the full sum of the mortgagee's claim, the latter recovers nothing but the insurance money, while the companies are reimbursed their outlay from the proceeds of the foreclosure sale. They lose nothing, and only the mortgagee loses. This consequence is avoided, and, I think, was intended to be avoided, by the provision in question, which makes the right of subrogation dependent upon the fact that its exercise shall not in any manner impair the right of the mortgagee to full payment of his claim. Where the contract provided that it should not impair the mortgagee's right to recover the full amount of his debt, the right to recover meant the right to demand and to receive full payment of his debt or claim. If that right is not impaired by the insurers' right of subrogation, as claimed by them, it is impossible to say under what circumstances it would be impaired. We cannot recognize the correctness of this claim on the part of the insurers.

2. Another question arises in regard to the so-called "contribution." It seems that the plaintiff, Eddy, without the consent of these defendant insurers, procured other insurance upon the property. This additional insurance thus procured rendered the policies of these insurers invalid as to the plaintiff. They contend, nevertheless, that in arriving at the proportion of the loss payable by each of them to the mortgagee, this other insurance should be reckoned as part of the insurance on the property. It was procured by plaintiff without the consent or knowledge of the mortgagee, and was not made payable in any event to him, and did not insure his interest in the property. If the claim of these defendant insurers be allowed, the effect is to reduce the amount which each is liable to pay to the mortgagee, and thereby to lessen his total recovery, as he has no claim under the other and additional policies. The clause under which this claim is made provides in the body of the policy that the insurer "shall not be liable for a greater proportion of any loss on the described premises than the amount thereby insured shall bear to the whole insurance, whether valid or not." I think the courts below were right in rejecting this claim of the insurers. Taken in connection with the language in the mortgage clause, the contract is quite plain. The provision in the latter clause that the insurance of the mortgagee should not be invalidated by any act or neglect of the owner of the property applies, among others, to a case of other insurance of his own interest by the owner without the knowledge or consent of the mortgagee. The effect of the mortgage clause hereinbefore set forth is to make an entirely separate insurance of the mortgagee's interest, and he takes the same benefit from his insurance as if he had received a separate policy from the company, free from the conditions imposed upon the owners. Where the company agreed that the mortgagee's insurance should not be "invalidated" by any act or neglect of the owner of the property, it was not intended to limit the application of that word to a case where the whole policy would otherwise be rendered invalid. The plain and obvious meaning of the language is that the insurance of the mortgagee should not be affected or in any wise impaired or lessened by any act or neglect of the owner. Although contained in the same policy issued to the owner, yet the insurer and the mortgagee were nevertheless entering into a perfectly separate contract of insurance, by which the mortgagee's interest alone was to be insured, and it would be most natural to provide that no act or neglect of the owner should invalidate—that is, impair—any portion of the insurance thus separately secured. Can it for a moment be supposed that a mortgagee would otherwise ever consent to such a contract? His desire is to obtain security, and to that end he insures his interest in the property. Would he knowingly consent that this security should be liable to be wholly frittered away and made valueless by the action of the owner, unknown to him, in procuring insurance upon the owner's interest in the property? Would any sane man agree to hazard his security in such a way? Would he agree that the value of his security should depend upon the acts of a third party over whom he had no control, and of whose acts he might be wholly ignorant? The statement of the proposition is its best refutation. These views are supported by both of the opinions in the case of *Hastings* v. *Westchester F. Ins. Co.* 73 N. Y. 141. There is some difference in the verbiage of the clause in the reported case and that to be found in the clause under examination here. In the *Hastings Case* the clause as to contribution contained the proviso that, in case of other insurance, the assured should recover only a proportionate sum from defendant company. The owner of the property had mortgaged it to plain-

tiff's testator, and had subsequently obtained an insurance upon his own interest as owner, and subsequent to that time the indorsement in favor of the mortgagee was made, and it was in the body of the policy issued to the owner that the language was used as to the assured. In the clause here under consideration it is seen that the word "assured" is not there, and the condition is that in case of other insurance the company shall not be liable under the policy, etc. The court in the *Hastings Case* thought the word "assured" referred to the person who was first insured when the policy was issued, and was not transferred to the mortgagee when he subsequently, by a minute placed in the policy, was made an assured also. This is very true, but a perusal of the whole case shows that the controlling idea was a separate insurance of the mortgagee, freed from the conditions attached to the insurance of the owner, and not to be impaired or weakened by any act or neglect of such owner. Force must be given to this positive language of the contract, and no act or neglect of the owner can be permitted to invalidate—*i. e.* impair or weaken (73 N. Y. 149)—the validity of the agreement for the full amount named in the policy. By taking the insurance in the manner the mortgagee herein did, instead of taking out a separate policy, all the provisions in the policy which from their nature would properly apply to the case of an insurance of the mortgagee's interest would be regarded as forming part of the contract with him, while those provisions which antagonize or impair the force of the particular and specific provisions contained in the clause providing for the insurance of the mortgagee must be regarded as ineffective and inapplicable to the case of the mortgagee. So when the agreement in regard to contribution, contained in the body of the policy issued to the owner, is compared with the specific statement in the mortgage clause that his insurance shall not be invalidated by any act or neglect of the owner, we can only give the latter due force by holding that the insurance of the mortgagee is not, in effect or substance, to be even partially invalidated,—*i. e.* reduced in amount,—and to that extent impaired and weakened by any act of the owner unknown to the mortgagee. In such case the general agreement in the body of the policy as to contribution does not, and was not intended to, apply. If it did, then the special and particular contract in the mortgage clause would be of no effect. If the two are inconsistent, the special contract, particularly relating to the mortgagee's insurance, must take precedence over the general language used in the policy issued to the owner. For these reasons the claims of the insurers for a deduction in the amount of their liability cannot be allowed.

3. As to three of the policies, the mortgage clause itself contained the provision that the company was only to be liable in the proportion which the sum it insured should bear to the whole amount of insurance on the property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee, or otherwise. What meaning is to be attached to this provision after taking into consideration the language heretofore quoted that the insurance of the mortgagee will not be invalidated by any act or neglect of the owner of the property? The act of obtaining this additional insurance was the act of the owner, and it was unknown to the mortgagee, and of course not consented to by him. The additional insurance could by no possibility benefit him, as it was not upon any interest of his in the property. He could not, therefore, resort to any of these additional policies for his indemnity. It is not a case of contribution in any sense, but simply one, on the insurers' theory, of diminution of their liability, caused by the act of the owner and unknown, and with no possible corresponding benefit to the mortgagee. As a general principle, it is settled that, before this apportionment of the loss between different companies can be demanded, the different policies must have been upon the same interest in the same property or some part thereof. *Lowell Mfg. Co.* v. *Safeguard F. Ins. Co.* 88 N. Y. 592. Has this principle been changed by this contract? Can it be that the mortgagee would knowingly consent to a diminution of this liability to an extent which might leave it of no value, consequent upon a secret act of a third party, and where by no possibility could he protect his security from such danger? All the reasoning given under the head last above discussed applies with equal force here, at least so far as the probabilities of entering into such a contract by the mortgagee are concerned. It is clear that the only object of the mortgagee is to obtain a security upon which he can rely, and this object is, of course, also plain and clear to the insurer. Both parties proceed to enter into a contract with that one end in view. In order to make it plain beyond question, the statement is made that no act or neglect of the owner with regard to the property shall invalidate the insurance of the mortgagee. When, in the face of such an agreement, entered into for the purpose stated, there is also placed in the instrument a provision as to the proportionate payment of a loss, we think the true meaning to be extracted from the whole instrument is that the insurance which shall diminish or impair the right of the mortgagee to recover for his loss is one which shall have been issued upon his interest in the property, or when he shall have consented to the other insurance upon the owner's interest. This may not, perhaps, give full effect to the strict language of the apportionment clause, but, if full effect be given to that clause, and it should be held to call for the consequent reduction of the liability of the insurers in such a case as this, then full effect is denied to the important and material, if not the controlling, clause in the contract, which provides that the insurance of the mortgagee shall not be injuriously "impaired or affected" by the act or neglect of the owner. As used in these mortgage clauses, this is the meaning of the word "invalidate." *Hastings* v. *Westchester F. Ins. Co.* 73 N. Y. 149. We must strive to give effect to all the provisions of the contract, and to enforce the actual

meaning of the parties to it, as evidenced by all the language used within the four corners of the instrument. We are also at liberty to consider the purpose for which the contract was executed, where that purpose plainly and necessarily appears from a perusal of the whole paper. That construction will be adopted in the case of somewhat inconsistent provisions which, while giving some effect to all of them, will at the same time plainly tend to carry out the clear purpose of the agreement; that purpose which it is obvious all the parties thereto were cognizant of and intended by the agreement to further and to consummate. There is no equity in this claim on the part of the insurers, and we think, from a perusal of the whole clause in the policy, that it was not intended to, and that it does not, cover such claim.

The judgment of the Supreme Court must be affirmed, with costs in each case.

All concur, except **Andrews**, *Ch. J.*, not sitting.

DISTRICT OF COLUMBIA COURT OF APPEALS.

James Leo McGRAW, Admr., etc., of Harry Leo McGraw, Deceased, *Appt.*,
v.
DISTRICT OF COLUMBIA.

(.....D. C.....)

1. **A municipality, upon which a statutory duty has been imposed of establishing and maintaining a bathing beach,** is not responsible for its safety, and the safe use of it by those likely to have recourse to it in the same manner as streets and highways, or even as parks and grounds kept for entertainment and amusement, without profit, are to be rendered safe.
2. **A municipality, required by statute to establish and maintain a free bathing beach upon the margin of a river** is not bound to warn the public against change in the bed of the stream, or to mark in any way the depth, or relative depth, of the water so as to guard the ignorant bather from venturing too far.
3. **If a municipality, required by statute to establish and maintain a free bathing beach, is liable** for its unsafe condition after the beach is opened, the detail of a policeman to preserve the peace and good order at such beach before the work of construction is completed, where boys and young men are in the habit of congregating and have for many years, is not an opening of the beach to the public and invitation to the public to use it.
4. **A municipal corporation, required by statute to establish and maintain a free bathing beach, if liable** for the condition of such beach, cannot be held responsible until it has completed the work of construction and thrown the beach open to the public for the uses contemplated.

(June 4, 1894.)

APPEAL by plaintiff from a judgment of a Special Term of the Supreme Court for the District of Columbia in favor of defendant in an action brought to recover damages for the death of plaintiff's intestate, which was alleged to have been caused by the negligence of defendant. *Affirmed.*

The facts are stated in the opinion.

Mr. **J. H. Ralston** for appellant.

Messrs. **S. T. Thomas** and **A. B. Duvall**, for appellee:

In the absence of statutory provision no action can be maintained against a municipality for neglect of a public duty imposed upon it as the agent of the public, for the benefit of the public, and for the performance of which the corporation receives no profit or special advantage.

Dill. Mun. Corp. 4th ed. §§ 965*a*, 975; *Benton* v. *Boston City Hospital Trustees*, 140 Mass. 13, 54 Am. Rep. 436; *McDonald* v. *Massachusetts Gen. Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Murtaugh* v. *St. Louis*, 44 Mo. 480; *Richmond* v. *Long*, 17 Gratt. 373.

The free bathing beach did not originate with the commissioners of the District of Columbia, and the act of congress providing for it imposed no duties upon the municipality.

Where a municipality elects or appoints an officer in obedience to a statute, to perform a public service, in which the corporation has no private interests, and from which it derives no special interest or advantage in its corporate capacity, such an officer cannot be regarded as an agent or servant of the municipality for whose negligence or want of skill it can be held.

Maxmilian v. *New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Ogg* v. *Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Hayes* v. *Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760.

A municipal corporation is not answerable for damages for the negligence of its officers in the execution of such powers as are conferred upon the corporation or its officers for the public good.

Kiley v. *Kansas*, 87 Mo. 103, 56 Am. Rep. 443; *Calvert* v. *Boone*, 51 Iowa, 687, 33 Am. Rep. 154; *Elliott* v. *Philadelphia*, 75 Pa. 347, 15 Am. Rep. 591; *McKay* v. *Buffalo*, 74 N. Y. 619; *Curran* v. *Boston*, 8 L. R. A. 243, 151 Mass. 505.

Morris, *J.*, delivered the opinion of the court:

By an act of congress approved September 26, 1890, entitled "An act establishing a free public bathing beach on the Potomac river, near Washington Monument," it was provided as follows:

"Be it enacted, etc., That the commissioners of the District of Columbia are hereby authorized and permitted to construct a beach

NOTE.—The above decision seems to be without any direct precedent. As to the liability of a private proprietor of a bathing resort, see Boyce v. Union Pac. R. Co. (Utah) 18 L. R. A. 509.

See also 33 L. R. A. 598.

and dressing houses upon the east shore of the tidal reservoir, against the Washington Monument grounds, and to maintain the same for the purpose of free public bathing, under such regulations as they shall deem to be for the public welfare; and the secretary of war is requested to permit such use of the public domain as may be required to accomplish the object above set forth.

"Sec. 2. That the sum of three thousand dollars is hereby appropriated from the revenues of the District of Columbia, to be immediately available for the purposes of this act." 26 Stat. 490.

The commissioners of the District had given their approval to the measure in advance upon reference of the bill to them by congress; and the beach and bath houses were thereupon constructed, under the superintendence of William X. Stevens, the enthusiastic person who had procured the enactment of the law, and were thrown open to the public on the 7th day of September, 1891. Four days before this last-mentioned day, namely, on the 3d of September, 1891, Harry Leo McGraw, a boy of the age of thirteen years and five months, together with a number of other boys, stated to have been about seventy-five in all, went in to swim at the beach. McGraw went in about 11 o'clock in the morning, and remained in the water until about 1 o'clock in the afternoon, when he was drowned. It is testified that he was unable to swim, although he went in near where there was a springing board for diving, which indicated deep water; and the body was found on the next day in deep water not far from the end of the springing board, where he seems to have gone down. There was a policeman on duty at the beach; but it does not appear that he saw McGraw go into the water, or had observed his movements at all. But few, if any, of the bath houses were open; and McGraw, as well as some of the other boys, undressed in the woods. One of the witnesses testified that he himself asked the policeman whether it was permitted to go in that morning, and that the officer replied that those who had bathing suits might go in. It does not appear whether young McGraw had a bathing suit or not.

The immediate cause of the drowning was that there was a deep gulley at the place, where the ground under the water shelved very suddenly, and there was a steep and dangerous descent. There were no lines at that time to mark the limits of the beach.

This suit was thereupon instituted by James Leo McGraw, the father of the unfortunate boy, as administrator of the deceased, to recover damages from the District of Columbia for the loss of the services of his son, for the funeral expenses of the latter, and for expenses incurred in curing the boy's mother, the wife of the plaintiff, of ill health resulting from the drowning of her son. At the trial, the plaintiff adduced testimony to prove the facts hereinbefore stated, and others not deemed important to be here specified. Besides this, there was proof that the boy had earned some money, which he gave to his mother for the support of the family; that he was a strong and healthy boy at the time of his death; and that his funeral expenses amounted to something upwards of $100. There was no proof offered of any expenses incurred, as alleged, in consequence of the ill health of the plaintiff's wife resulting, as claimed, from the death of the son, and it would have scarcely served any useful purpose to adduce such proof, notwithstanding the allegation of the fact in the declaration.

No proof was offered on behalf of the defendant. But defendant's counsel, upon the close of the plaintiff's case, prayed the court to instruct the jury to return a verdict for the defendant, on the twofold ground that the district was not liable in the case as matter of law, and that the ill-fated boy, on account of whom the suit had been instituted, had been himself chargeable with contributory negligence. The court gave the instruction, over the plaintiff's objection; and the jury rendered their verdict in accordance therewith, upon which there was judgment for the defendant. From this judgment the plaintiff appealed.

Two questions are suggested by the bill of exceptions, and the assignments of error: (1) Whether there was any liability in this case on the part of the District of Columbia to the plaintiff; and (2) whether there was contributory negligence on the part of the deceased.

1. It may well be doubted whether the act of congress that has been cited in this case was intended to impose any duty upon the District of Columbia, such as is sought to be enforced in the present suit. The act is permissive in its character, and not mandatory. It is not mandatory either upon the secretary of war to permit the use of the public grounds for the purpose in question, or for the commissioners of the District of Columbia to carry the purpose into effect. And even if it should be assumed that there was a duty imposed by it, from which a liability might accrue, it is not at all clear that the District of Columbia is chargeable with that duty, which was laid by express terms, not on the district as a municipality, but upon the commissioners of the district as a superadded obligation.

But however this may be—and we desire not to be understood as distinctly deciding this point—we cannot accept the theory that the municipality, even if the duty has been imposed upon it of establishing and maintaining this beach, can be held responsible for its safety, and the safe use of it by those who are likely to have recourse to it in the same manner as streets and highways are to be rendered safe, or even as parks and grounds kept for entertainment and amusement, without direct profit or advantage to the municipality, might have to be maintained in a condition of safety. Land covered by water is necessarily more or less beyond the ordinary control of man; and the margins of streams, rivers, and lakes, as well as of the ocean, are subject to a power which the ordinary operations of man may neither determine nor direct. To hold that the margin of a great river, with the mighty volume of water that constantly comes down to disturb its configuration, should be kept level and smooth,

free from holes and depressions, and equally safe for the use of adult man and the child of tender years, would be to demand the impossible. It is common experience that the bed of a river is in course of constant change; and that in places the sand and earth are accumulated, in other places excavated or depressed and holes and ravines formed even in a single night. It cannot be that there is any duty imposed upon the municipality that charges it with knowledge of these mutations and requires it to warn the public against them. Neither do we understand that, in the establishment of a free bathing beach, there is any duty imposed upon it to mark in any way the depth or relative depth of the water, so as to guard the ignorant bather from venturing too far. This is a case in which the bather must rely upon his own senses and his own caution; and he has no right to have the municipal authority substituted for the exercise of his own judgment.

If there was a duty imposed in this instance upon the municipal authorities of the District of Columbia, it was: (1) "To construct a beach and dressing houses;" and (2) "To maintain the same." These are the terms used in the statute. Now, towards individuals certainly no liability could accrue under the statute until the municipality had completed the work of construction, and thrown the beach open to the public for the uses contemplated. No one was entitled to use this beach as a bathing beach, so as to hold the municipality liable for any negligence in its construction, if any such there was, until in some manner the municipality made known to the public that the work was completed and invited them to the use of it. By the testimony uncontroverted and undisputed of the plaintiff's own witness, the beach was not thrown open to the public until the 7th day of September, 1891; and the misfortune that deprived this boy of his life occurred on the 3d day of September, 1891. The boy was there furtively, as a trespasser, without invitation and without right, so far as the municipality was concerned; and it would be the grossest injustice to hold the latter responsible for an injury which it did not occasion and against which, in the nature of things, it could not have guarded. This circumstance we regard as decisive of the case, and conclusive against the plaintiff's right to recover.

But it is argued in the face of this direct and positive testimony given by the plaintiff's own witness, that there are other circumstances from which the jury might properly have inferred a license from the municipality to the public to use the bathing beach even before the 3d of September, 1891, such as the presence of a policeman there, the fact that many of the boys were permitted to go in without objection, the statement of the policeman that those boys might go in who had bathing suits, and the statement of the boy's father, the plaintiff in this case, that "he had not made any personal examination of the beach to see if it was safe, and only knew about it from the fact of reading in the Star that it was open; they advertised that it was open." But we cannot regard the detail of a policeman to be present to preserve the peace and good order at a place where it was known that boys and young men were in the habit of congregating and had probably congregated for half a century and upwards, as any evidence whatever that the municipality had complied with the provisions of an act of congress, and was prepared to incur liability to the amount of $10,000 to every individual that thought proper to go into the Potomac river at that point. And of course the statement of the plaintiff as to what he saw in the Star, or thought he saw there, cannot be accepted for a moment as testimony in this case. There is absolutely no testimony whatever and nothing to go to the jury, with reference to the time at which this beach was opened to the public, and the liability of the district for its safe condition began, if it ever began, other than the statement of the plaintiff's witness, Stevens, who had the best opportunity possible to know, as he was the originator of the scheme and the superintendent of the work, that it was not thrown open to the public until the 7th of September. And as we have said, this statement is, in our opinion, conclusive of the plaintiff's case.

2. We do not consider that the question of contributory negligence arises in this case inasmuch as we find no evidence of negligence on the part of the defendant. The accident was the result wholly either of the boy's own recklessness, or was his misfortune—most probably the latter.

3. It seems important to us that we should not fail to notice another question that is involved in this case, although no point was made of it in the court below, and none was made in argument before us. This suit is instituted under the provisions of the Act of Congress of February 17, 1885 (23 Stat. 307), entitled "An act to authorize suits for damages where death results from the wrongful act or neglect of any person or corporation in the District of Columbia," which is one of the numerous statutes, now believed to be quite general in this country, based upon what is known as *Lord* Campbell's Act in England. We greatly doubt whether this statute authorizes such a suit as that which we have before us here. The statute evidently contemplates actions for the benefit of those who have been deprived of the protection and support of husbands, parents, and others standing in analogous relations; and was scarcely intended to include administration upon the estates of children and suits by such administrators. The earnings, present and prospective, of the boy in this case belonged in law to his father, as such, and not to any administrator, and the expenditure for his funeral was an expenditure incumbent on the parent for which that parent might sue the wrongdoer who caused the death, if such there was. It is unnecessary for us to decide this question here; and we do not decide it. But we do not wish it to be passed in silence, in such manner that the case may hereafter be cited as a precedent on that point.

From what we have said, it results that *the judgment of the court below must be affirmed with costs;* and it is accordingly so ordered

CONNECTICUT SUPREME COURT OF ERRORS.

Albert M. WOOSTER, *Appt.*,
v.
Frederick C. MULLINS *et al.*

(.....Conn.....)

A tie vote on which the mayor may give a casting vote for each of two official newspapers to be chosen is presented by a vote of twelve aldermen, in which three newspapers received four votes each, where the charter provides that two shall be chosen, but that each alderman shall vote for one only, and a general charter provision gives the mayor a casting vote in case of a tie.

(*Andrews, Ch. J., and Hamersley, J., dissent.*)

(May 29, 1894.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Fairfield County in favor of defendants in an action brought to enjoin the payment of the contract price for publishing city notices for the city of Bridgeport on the ground that the contract was illegal. *Affirmed.*

A clause of the city provided that:

"In all cases wherein matter is by the charter of the city of Bridgeport required to be published in newspapers published in said city, such publication shall be in two daily newspapers published in said city, to be designated by the common council of said city, and in making such designation no member of either branch of said common council shall vote for more than one of said newspapers."

The board of councilmen of the city of Bridgeport designated the Bridgeport Evening Farmer and the Bridgeport Evening Post as their choice of newspapers to publish the proceedings. The resolution was then transmitted to the board of aldermen for action. This board consisted of twelve members. A vote was taken which resulted in four votes each being given in favor of the Bridgeport Evening Farmer, the Bridgeport Evening Post, and the Bridgeport Evening News. Thereupon the mayor declared the vote to be a tie and cast a vote for each of the two papers which had been designated by the board of councilmen.

Further facts appear in the opinion.

Messrs. **A. B. Beers** and **Stiles Judson, Jr.,** for appellant:

The proceeding for the selection of official newspapers is not within the operation of section 7 of the charter, which provides as follows: "The common council of said city shall consist of two separate bodies, namely: the board of aldermen, composed of all the aldermen, and the board of councilmen, composed of all the councilmen, which bodies shall meet separately, except as hereinafter provided. The mayor shall preside at the meetings of the board of aldermen, and shall have a casting vote only in case of a tie."

The "casting vote," at common law, "signifies sometimes the single vote of a person who ordinarily does not vote, and in case of an equality of votes, sometimes the double vote of a person who first votes with the others and upon an equality creates a majority by giving a second vote."

Anderson's Law Dict.

That condition only is contemplated which can be determined by a vote on the part of the mayor; not such condition as would require a succession of votes, upon the subject-matter before the board, in order to dissolve the tie.

It was the plain duty of the mayor to require the members of the board to continue to vote upon the subject-matter before the board, until such result was accomplished by any one ballot as lawfully designated two different newspapers.

Can the doctrine of election by plurality be applied in any conceivable manner to the proceedings prescribed by the charter for the designation of the official newspapers?

It cannot when the vote on which the tie was disclosed is treated as one subject-matter, and as one vote thereon.

By what process of reasoning can it be demonstrated that while the members were confined to one effective vote on the subject, the mayor shall have two votes, and which, if true, must be predicated upon the theory that there have been two different matters before the board for their action.

The designation of these papers is in its nature, not an election of a person to an office or position within the gift of the common council, but is merely a certain prescribed method of contracting with said newspapers.

Designations of this character have always been treated as mere contracts with the newspapers thus selected.

Re Phillips, 60 N. Y. 25; *Re Astor's Petition*, 50 N. Y. 368.

The charter plainly prescribes a certain procedure as a condition precedent to the power to make these contracts.

Peterson v. *New York*, 17 N. Y. 449; 1 Dill. Mun. Corp. §§ 449, 463; *Stoughton Third School Dist.* v. *Atherton*, 12 Met. 113; *Francis* v. *Troy*, 74 N. Y. 340; *Weitz* v. *Des Moines Independent Dist.* 79 Iowa, 423; *Russell* v. *Gilson*, 36 Minn. 667; 2 Beach, Pub. Corp. §§ 252, 821; *Crutchfield* v. *Warrensburg*, 30 Mo. App. 456.

An unauthorized act can be ratified by a municipal corporation only where such act could have been authorized in the first instance, and even then the subsequent approval will not have the effect of making good the original defect where the mode of contracting operates as a limitation upon the power to contract.

1 Beach, Pub. Corp. §§ 251, 696, p. 696, and cases cited in *note 1*, 713; *Hodges* v. *Buffalo*, 2 Denio, 110; *Halstead* v. *New York*, 3 N. Y. 437; *Logansport* v. *Dykeman*, 116 Ind. 17; 1 Dill. Mun. Corp. § 463.

The rights, powers, and duties of the mayor

NOTE.—A novel extension of the rule as to casting votes by presiding officers is made by the above decision. As to what constitutes a majority which will carry a measure voted on including the case of a casting vote, see *note* to Lawrence v. Ingersoll (Tenn.) 6 L. R. A. 308. See also Magenau v. Fremont (Neb.) 9 L. R. A. 736; State v. Vanosdal (Ind.) 15 L. R. A. 832.

See also 31 L. R. A. 116; 37 L. R. A. 205; 39 L. R. A. 282.

of the city are plainly prescribed by law, and every person entering into business relations with him is presumed to know the scope of his authority upon any given subject.

Dibble v. *New Haven*, 56 Conn. 201; 1 Dill. Mun. Corp. §§ 447, 459, 528, 542; *Francis* v. *Troy*, *supra*.

The law will not permit of a recovery for services rendered on a quantum meruit.

Stidger v. *Red Oak*, 64 Iowa, 466; *People* v. *Flagg*, 17 N. Y. 584; *Crutchfield* v. *Warrensburg*, *supra*; 1 Beach, Pub. Corp. § 692.

Baldwin, J., delivered the opinion of the court:

The main question in this case is whether the vote of the aldermen was a tie vote, within the meaning of the city charter. The word "tie," as applied to an appointment by election, signifies a state of equality between two or more competitors for the same position. Cent. Dict. in verb. The provision that two newspapers shall be designated by a vote in which no member of either branch of the common council shall vote for more than one evidently contemplates the selection of one, and permits the selection of both, by the action of less than a majority of each board. "In elections in which the principle of plurality is adopted, the candidate who has the highest number of votes is elected, although he may have received but a small part of the whole; and, where several persons are voted for at the same time for the same office, those (not exceeding the number to be chosen) who have respectively the highest number of votes are elected. But where two or more persons have equal numbers of votes there is no election, and a new trial must take place, unless some other mode of determining the question is provided by law. In some of the states where the votes are thus divided, the returning officers are authorized to decide between them, and to return which they please; but, unless thus expressly authorized by law, the returning officers have no casting vote." Cushing, Law & Practice of Legislative Assemblies, § 118. "By a 'casting vote' is meant one which is given when the assembly is equally divided, and when the question pending is in such a situation that a vote more on either side will cast the preponderance on that side, and decide the question accordingly; and not merely a vote which, if given on one side, will produce an equal division of the assembly, and thereby prevent the other side from prevailing. This principle extends to cases of election by ballot. In these cases the speaker does not vote by ballot, but waits until the votes are reported, and then votes orally, not for whom he pleases, but for one, or for the requisite number, of the candidates voted for, who have received an equal number of votes. This principle applies equally in those cases where a less number than a majority is permitted, or a greater is required, to decide a question in the affirmative. Thus, if one third only is permitted or required, and the assembly, on a division, stands exactly one third to two thirds, there is then occasion for the giving of a casting vote, because the presiding officer can then, by giving his vote, decide the question either way." Id. § 306. An apt illustration of this method of procedure, as applied to cases of more than two contestants for the same position, is afforded by the practice of balloting for select committees in the British house of commons. "The majority necessary to an election is not an absolute majority of all the persons voting, but only a plurality; and if there are several persons, who all have the same number of votes, and the whole would make more than the number fixed for the committee, the speaker gives a casting vote for the election of the requisite number." Id. § 1882. A tie is that which is tied. It is a knot. And when provision is made, in regulating legislative procedure, for a casting vote by the presiding officer in case of a tie, the object is to allow him to untie this knot. The charter of Bridgeport evidently looks to the designation of the two official newspapers by one and the same vote, each member of the respective boards voting for one alone. The mayor is a component part of the common council, but he is not a member of either of the two branches or boards, which, with him, constitute that body. He is therefore not forbidden, in the selection of the official newspapers, to vote for more than one of these. The ballot taken by the aldermen, resulting in four votes for each of three different newspapers, presented the case of a tie, and to dissolve it the mayor's casting vote was properly and necessarily given for two of them, for the charter required the simultaneous designation of two. It follows that the demurrer to the complaint was properly sustained.

There is no error in the judgment appealed from.

Torrance and **Fenn**, *JJ.*, concurred; **Andrews**, *Ch. J.*, and **Hamersley**, *J.*, dissented.

NEW YORK COURT OF APPEALS.

Re ESTATE OF Cornelius V. S. ROOSEVELT, Deceased.

(.....N. Y.....)

1. The statute in force at a person's death governs the decision as to a collateral inheritance tax on his estate.

2. Life annuities contingent on survivorship are not subject to a collateral inheritance tax until they vest by the termination of the life on which they are contingent.

3. A contingency affecting the value of a vested remainder under a will so long as it continues will prevent the charge of a collateral inheritance tax upon the remainder.

NOTE.—For a collection of authorities upon the construction of the statute imposing a tax upon successions or collateral inheritances, see *note* to *Re* Romaine (N. Y.) 12 L. R. A. 401.

See also 26 L. R. A. 259.

(October 9, 1894.)

APPEAL by the Comptroller of the City of New York from an order of the General Term of the Supreme Court, First Department, reversing an order of the New York County Surrogate's Court, which fixed the amount of the collateral inheritance tax to be paid by the estate of Cornelius V. S. Roosevelt, deceased. *Affirmed.*

The facts are stated in the opinion.

Mr. **Edward Hassett,** for appellant:

The remainders devised to the nephews and nieces are "vested remainders" and are now subject to the payment of the tax.

4 Rev. Stat. p. 2516; *Cook* v. *Lowry*, 95 N. Y. 103; *Beardsley* v. *Hotchkiss*, 96 N. Y. 201; 4 Kent, Com. 202, Comstock's 11th ed. p. 228; *Delafield* v. *Shipman*, 18 Abb. N. C. 297, 303; *Weed* v. *Aldrich*, 2 Hun, 531; *Williamson* v. *Field*, 2 Sandf. Ch. 535, 7 L. ed. 693; *Kelso* v. *Lorillard*, 85 N. Y. 177; *Blanchard* v. *Blanchard*, 1 Allen, 227; *Sheridan* v. *House*, 4 Abb. App. Dec. 218; *Everitt* v. *Everitt*, 29 N. Y. 39; *Tard* v. *Morton*, 60 N. Y. 502; *Campbell* v. *Stokes*, 142 N. Y. 23.

A valuation most favorable to the remaindermen has been fixed, and as such valuation is based upon proper evidence it is equivalent to a finding of fact by a court or a verdict by a jury and will not be disturbed on appeal.

Re Knoedler's Will, 140 N. Y. 379.

The tax upon vested remainders is due and payable immediately upon decedent's death.

Laws 1887, chap. 713, § 2; Dos Passos, Collateral Inheritance Tax, p. 163, citing *Re Vinot's Estate*, 26 N. Y. S. R. 610; *Van Rensselaer's Estate*, N. Y. L. J. May 28, 1889; *Re Cogswell*, 4 Dem. 248; *Re Lefever*, 5 Dem. 184; *Re Higgins*, N. Y. Daily Reg. Dec. 7, 1889.

Where the interest of the life beneficiary is not taxable and that of the remaindermen is, it has been held that the amount of the remaindermen's tax is lawfully payable out of the principal, notwithstanding the tax on the remainder will reduce the capital, and so affect the income of the life tenant.

Re Johnson, 6 Dem. 146; *Re Leavitt's Estate*, 4 N. Y. Supp. 179; *Re Peck*, *note*, 24 Abb. N. C. 365; *Re Wooley*, *note*, 19 Abb. N. C. 234; *Re Enston*, 113 N. Y. 185; *Re Stewart's Estate*, 14 L. R. A. 836, 131 N. Y. 274.

The annuitants are beneficially entitled in expectancy to an interest in or income from the property of the testator transferred by his will, and the tax thereon is immediately due and payable.

Each of said annuities is an interest in property or income therefrom within the meaning and intent of the statute.

Dos Passos, Collateral Inheritance Tax, p. 154; *Bispham's Estate*, 24 W. N. C. 79; *Thompson's Estate*, 5 W. N. C. 19.

The right to the collateral inheritance tax accrues at the date of the death of the testator or intestate, and not at that of its actual imposition, and is not affected by intervening legislation.

Re Prime's Estate, 18 L. R. A. 718, 136 N. Y. 347.

Messrs. **George H. Yeaman, John E. Roosevelt,** and **George C. Kobbe** for respondents.

Bartlett, J., delivered the opinion of the court:

The question presented on this appeal is whether the interests of annuitants and remaindermen under the will of the late Cornelius V. S. Roosevelt are liable to pay presently the collateral inheritance tax. The surrogate's court for the county of New York determined this question in the affirmative, and its order to that effect was reversed by the general term of the first department. The comptroller of the city of New York appeals to this court.

The testator died September 30, 1887, and his will was admitted to probate in the county of New York March 17, 1888. After certain specific legacies to his wife, the testator disposes of his residuary estate as follows, viz.: The entire amount to be held by the executor and the executrix in trust, to pay the income thereof to his wife during her life. At her death seven life annuities are given,—to two persons, $1,000 each; to two persons, $500 each; and to three persons, $5,000 each, with interests in these latter in the nature of cross-remainders, contingent upon survival *inter se*, the will providing as follows: "In case any one of the three last-named annuitants . . . shall die either before or after the death of my said wife, I direct my executors to pay, and I bequeath, to each of the two survivors of them, an annuity of $7,500; and, in case any two of them shall die either before or after the decease of my said wife, I direct my executors to pay, and I bequeath, to the last survivor of them, an annuity of $15,000." On the decease of the wife the estate is given, subject to the payments of the annuities, to twelve nephews and nieces. Two of these remaindermen died before the testator, and the appraiser, upon the theory that there was no lapse, and that the survivors would take the whole remainder, has made his estimate accordingly. The appraiser reported in the first instance as follows: "The persons who will become entitled to the annuities mentioned in the will cannot now be determined, until the death of the wife; and for that reason also the value of decedent's estate, which is devised at her death to his nephews and nieces, and subject to such annuities, cannot now be ascertained." The surrogate sustained objections to this report, and the matter was sent back to the appraiser. The surrogate requested the superintendent of insurance to ascertain the value of the annuities, and, acting upon his information, the appraiser reported the values of the annuities and the estates in remainder. The matter was then duly sent back to the appraiser for the third time, to enable the superintendent of insurance "to correct manifest errors." The third report of the appraiser increased the value of the compound survivorship annuities, and considerably diminished the value of the estates in remainder, as contained in his second report. This report was confirmed, and was followed in due course of procedure by the order now here for review. We are of opinion that this case must be decided under the Law of 1887, in force at the time of testator's death.

Two questions are presented for our determination, viz.: First. Are the annuities created by the will such property, in a legal sense, as to be presently taxable, and can their fair and clear market value at the time of the death of the testator be ascertained? Second. Is the fair and clear market value at the time of testator's death, of the estates in remainder, ascertainable, and is the tax thereon due at once? In deciding both of these questions, we are to reasonably construe the statute, and give effect, if possible, to all its provisions. As to the annuitants, the appellant's counsel contends that they are entitled to an interest in or an income from the property of the testator, and the statute requires the tax to be paid immediately. He goes on to say, in his printed argument: "It may, of course, be considered as a hardship to compel the annuitants to pay a tax upon an interest that they may never receive; but that is the fault of the statute, and under its wording the payment of the tax can only be postponed by giving a bond." This concession admits away the entire case of the state. It is not to be assumed that the legislature intended to compel the citizen to pay a tax upon an interest he may never receive, and the reasonable construction of this statute leads to no such unjust result. It does not follow, because the legislature taxes persons beneficially entitled to property or income, in possession or expectancy, that a tax was thereby imposed upon an interest that may never vest. Until that time arrives the power to tax does not exist. The testator has created seven life annuities, if the annuitants survive his wife, and there can be no vested interest in any of them until the happening of that event. All may survive; a portion may be living; every one may be dead. To hold such a possibility presently taxable, and its value capable of immediate computation, shocks the sense of justice.

This brings us to the remaining question, as to the taxation of the estates in remainder. The testator has, on the death of his wife, given his entire estate to twelve nephews and nieces, subject to the payment of the annuities. Two of these remaindermen, as already stated, died before the testator. It is contended by the respondents that it is impossible to ascertain the fair and clear market value of these remainders at the time of the death of the testator, for the reason that the annuitants represent estates or interests unvested and contingent, which, taken in connection with the life estate of the widow, renders the present value of the ultimate remainders unascertainable. The amount that will ultimately be paid to the remaindermen is contingent, depending on future events. Whenever the tax on the annuities is payable, the estate must pay it. What the amount of that tax will be depends upon the survivorship of annuitants, and the number of life annuities, if any, that shall vest on the death of the widow. This court has recently decided that it is not the vesting of remainders that renders them contingent taxable interests under the law. *Re Curtis*, 142 N. Y. 219. In the case cited it was held that the nominal fee might never become a taxable estate, for the reason that, if the nephews and nieces in whom it was claimed to have vested died without issue before the termination of certain trusts, the fee would pass to lineals not taxable. This was the uncertainty which postponed the payment of the tax. In the case at bar there is a contingency affecting the value of the estate, as already indicated, which brings it strictly within the principle of the *Curtis Case*.

The learned counsel for the respondents has pointed out questions that they may present on the death of the widow. One involves the legal effect of the death of two remaindermen in the lifetime of the testator, and the other the correctness of the mode adopted by the superintendent of insurance in ascertaining the value of the compound survivorship annuities. These questions will become important on the falling in of the life estate, but we express no opinion in regard to them at this time.

In affirming the order of the general term, we not only give to the Act of 1887 a reasonable construction, but carry out the obvious intent of the testator that his widow should enjoy, during her life, the entire income of his estate. The legislature, in the Act of 1892, has given a practical construction to its previous legislation on this subject, when it provides that, where the fair market value of the property or interest cannot be ascertained at the time of the transfer, the tax shall become due and payable when the beneficiary shall come into actual possession or enjoyment. Laws 1892, chap. 399, § 3.

The order should be affirmed, with costs.

All concur, except **Andrews**, *Ch. J.*, not sitting.

PENNSYLVANIA SUPREME COURT.

Samuel HARDIE
v.
Lydia B. HARDIE, *Appt.*

(152 Pa. 227.)

1. Willful and malicious desertion, as cause for divorce, is not shown by the fact that the wife, in a passion roused by a single blow by her husband, leaves the house without intending to remain away permanently, and on reflection returns to find the home barred against her and then seeks by violence to enter, for which she is prosecuted by the husband, and thereafter does not return.

2. A single blow given in anger by husband to wife is not necessarily cruel and barbarous treatment constituting cause for divorce.

(July 11, 1894.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Chester

NOTE.—As to divorce for desertion, see also Herald v. Herald (N. J.) 9 L. R. A. 696, and *note*; also Williams v. Williams (N. Y.) 14 L. R. A. 220; Jones v. Jones (Ala.) 18 L. R. A. 95.

For refusal of marital intercourse as desertion, see Fritts v. Fritts (Ill.) 14 L. R. A. 685, and *note*.

See also 47 L. R. A. 750.

County in favor of plaintiff in an action for divorce on the ground of desertion. *Reversed.*

The court gave a binding instruction in favor of plaintiff on the ground that willful desertion was proved, and refused to grant defendant's request that if the jury believed that plaintiff struck his wife, or was guilty of cruel or barbarous conduct toward her, she was justified in leaving and your verdict must be for the defendant. To that request the following answer was given:

"That point is a little ambiguous in our estimation, and, as I have already suggested to you, there might be an occasion when if the husband struck the wife once it would justify her in leaving. But, as we have said to you, the evidence in this case does not show such an act. We cannot say, therefore, that if the jury believe that the plaintiff struck his wife, it was a justification of her leaving, but we can say, or would say, that if he was guilty of cruel or barbarous conduct towards her, she would be justified in leaving the plaintiff, and your verdict would be such as to justify her in that case. Such is the law, if the conduct is of such a cruel and barbarous character as I have already suggested, such as to endanger her life. As you will see I can scarcely affirm or disaffirm the point, but I pass it with the suggestions which I have already made."

Further facts appear in the opinion.

Mr. **Charles H. Pennypacker** for appellant.

Mr. **Thomas W. Pierce** for appellee.

Dean, J., delivered the opinion of the court:

Plaintiff and defendant are libelant and respondent in a suit by the husband for divorce from the bonds of matrimony. The issue was tried before a jury, who, under peremptory instructions from the court, gave a verdict for the husband. From the judgment on the verdict the wife brings this appeal.

The ground for divorce averred in the libel is willful and malicious desertion by the wife. She admitted absence from his house, and separation; but that there was willful and malicious desertion she denied. She further set up the counter averment that her husband, by his cruel and barbarous treatment, had driven her from his home. The parties were married in August, 1867, and lived together as husband and wife until the 12th of November, 1890, the day of separation. They were childless. Both were caterers and cooks, and by their joint industry during more than twenty years of married life had accumulated some property, real and personal. The legal title to the real estate was in the husband, though the wife had contributed from her earnings a considerable part of the purchase money. Some time before the separation, disputes and quarrels arose between them. He suspected she was not as strong a prohibitionist as he was, or professed to be. She suspected his fidelity in the marriage relation. The suspicions of both were apparently groundless, but they were sufficient to arouse a sort of domestic animosity on part of each towards the other, which culminated in his striking her, and she, smarting under the indignity, left his house. That this was the immediate cause of her leaving is hardly disputed. The learned judge of the court below assumed that this single blow was the only instance of cruel and barbarous treatment; and this, under the law, not being sufficient to justify or excuse her desertion, the plaintiff was entitled to a verdict. If this had been the only question in the case, the instruction was correct. But there is another view of the evidence applicable to the pleadings which the jury had a right to consider. Both agree she left the house on the 12th of November. She testifies she left "to go to work." Although they had a quarrel on that day, and probably the day before, she says she did not intend, by leaving it, to give up her home; that she went back the next day, and "put away her things,"—did not take them away; then went back on the third day, when she found the locks had been changed, and she gained an entrance only by breaking the window. She declares she never had left the house intending to remain away; that she could not get in, unless by a forcible entrance, afterwards, and for breaking this window the husband had instituted a prosecution against her. This is the substance of her testimony. The charge on which the husband based his right to divorce was willful and malicious desertion. If the wife, in a passion, aroused by the single unmanly blow of the husband, leaves his house, in a mere spirit of resentment, not intending to permanently desert him, then, on reflection, returns, and finds her home barred against her, then by violence seeks to enter, then is prosecuted by the husband, and thereafter does not return, this in no legal sense of the words is a "willful and malicious desertion." Such desertion is a departure without adequate cause, but not a willful absence, regardless of her marital duty. Such a blow as she testifies he gave her, some wives, of physical courage and strength, would have resented by giving the husband another, and there probably the quarrel would have ended. This wife resented it by leaving his presence, going out of the house. She was probably too weak or too timid to retaliate in any other way; but she testifies that in so doing she did not intend to "give up her home." Then, when she did return, his conduct enforced upon her further absence. Such desertion as this is not willful and malicious, even if he struck her but a single blow before she left. If her testimony be believed, his conduct, after she left, indicates an intention to prevent her return. The instruction that it was not the duty of the husband to persuade the wife to return was correct; but the jury should also have been told that, if she left the house, under the provocation of a blow, and soon after returned, it was his duty to receive her; and that if he, in anticipation of her return, locked the doors against her, he cannot be heard to say that her absence thereafter was willful and malicious desertion. In *Grove's App.*, 37 Pa. 443, we held that the wholly inexcusable departure of the wife from her husband's house did not justify him in refusing to receive her when she returned; that

such conduct on his part was a virtual turning her out of doors.

The evidence tending to show cruel and barbarous treatment, such as would justify her in leaving the husband, is mainly that of the wife. She testifies to repeated assaults and indignities; but, with the exception of the personal violence immediately before the separation, no dates are given. Most of this conduct appears to have been afterwards. Her testimony is disconnected, and in some material particulars, such as dates, or even approximate dates, vague; and, although it covers more than a dozen printed pages of the paper book, the examination does not seem to have been aimed at eliciting a specific statement of facts. It is therefore impossible to attempt a satisfactory review of the alleged error of the court in the refusal to affirm defendant's first point. The law applicable to the facts as the court assumed them to be proven is correctly stated. The court says: "I can scarcely affirm or disaffirm the point, but I pass it with the suggestions already made." The suggestions already made were, in substance, that the evidence of a single blow would have been insufficient to warrant, on her application, a divorce of the wife from her husband on the ground of cruel and barbarous treatment, and therefore was insufficient to justify her desertion of him. If there was a willful desertion,—that is, a departure with the intention not to return,—it was malicious, unless justified by such cruel and barbarous treatment as endangered life or health and rendered cohabitation unsafe. Cruel and barbarous treatment is not established by a single blow of the character of this one, given in anger. If the several acts of violence and threats alleged occurred before the separation, the burden was on defendant to prove that fact; if they were after she left him, clearly they did not prompt her to that act, whatever bearing they might have on the question as to whether a desertion at first causeless, afterwards, by reason of his conduct, ceased to be willful. We can very well discern how, on the character of the evidence on this point, it was as difficult for the court to affirm or disaffirm it as for us to say he erred in not affirming it. The evidence was not specific enough to warrant a specific answer. But we think the court, in not submitting the evidence on the first question to the jury, erred, for, even although it would not have entitled her to a divorce from her husband on the ground of cruel and barbarous treatment, yet, if believed by the jury, there was not willful and malicious desertion.

The judgment is reversed, and a *venire facias de novo* awarded.

John E. PRICE *et al.*

v.

William L. SCHAEFFER, *Appt.*

(161 Pa. 530.)

Absence of service of process in the original suit may be shown in defense of a suit upon a judgment procured in another state, although service is recited as a fact in the record upon which the judgment is based.

(May 21, 1894.)

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 1, for Philadelphia County in favor of plaintiffs, in an action brought to enforce payment of a judgment recovered against the defendant in the state of Maryland. *Reversed.*

In his affidavit of defense, defendant alleged that at the time the suit was brought he was not a resident of the county in which the suit was brought, but of another county; and that he had never been a resident of the county where the suit was brought; that he was never served with any summons or paper of any kind in the suit; that the other defendants in the original suit were residents of the county where the suit was brought and were actually summoned; that the summons ran to all the defendants in that suit, and the sheriff made a simple return "summoned" to the writ; that defendant filed a bill in equity in Maryland to have the judgment canceled and set aside, but the court refused to interfere, upon the ground that defendant had a good defense to the action in Pennsylvania, provided he was not actually served with summons in Maryland.

Further facts appear in the opinion.

Mr. **A. E. Stockwell,** for appellants:

Neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the acts of congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which the judgment offered in evidence was rendered.

Thompson v. *Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 897.

The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist.

Knowles v. *Logansport Gas Light & Coke Co.* 86 U. S. 19 Wall. 58, 22 L. ed. 70; *Hall* v. *Lanning*, 91 U. S. 160, 23 L. ed. 271; *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565; *Weaver* v. *Boggs*, 38 Md. 255; *Grover & B. Sewing Mach. Co.* v. *Radcliffe*, 66 Md. 511; *Fairfax Forrest Min. & Mfg. Co.* v. *Chambers*, 75 Md. 614; *McDermott* v. *Clary*, 107 Mass. 501; *Gilman* v. *Gilman*, 126 Mass. 26, 30 Am. Rep. 646; *Guthrie* v. *Lowry*, 84 Pa. 533; *Motter* v. *Welty*, 2 Pa. Dist. Rep. 39; Whart. Confl. L. § 811; Story, Confl. L. § 609.

The question of jurisdiction may be inquired into although the judgment is binding and conclusive in the state in which it was rendered.

Steel v. *Smith*, 7 Watts & S. 448; *Guthrie* v. *Lowry*, *Thompson* v. *Whitman*, and *Weaver* v. *Boggs*, *supra*; *Grover & B. Sewing Mach. Co.* v. *Radcliffe*, 66 Md. 517; *Bazley* v. *Linah*, 16 Pa. 241, 55 Am. Dec. 494; *Veite* v. *McFadden*, 3 W. N. C. 63.

The Maryland courts enforce the just prin-

NOTE.—As to impeachment of foreign judgment, see *note* to Dunstan v. Higgins (N. Y.) 20 L. R. A. 668.

ciple that, when a judgment is carried from a sister state into the state of Maryland for enforcement, the state of Maryland has a right to question the jurisdiction of the court where judgment was obtained.

Weaver v. *Boggs*, 38 Md. 255; *Hanley* v. *Donoghue*, 59 Md. 245, 43 Am. Rep. 554; *Grover & B. Sewing Mach. Co.* v. *Radcliffe*, 66 Md. 517; *Fairfax Forrest Min. & Mfg. Co.* v. *Chambers*, 75 Md. 614.

Messrs. **William C. Duror and Horace M. Rumsey**, for appellees:

The record shows the appellant was summoned and appeared. The judgment is therefore conclusive.

Wetherill v. *Stillman*, 65 Pa. 105; *Reber* v. *Wright*, 68 Pa. 471; *Guthrie* v. *Lowry*, 84 Pa. 537; *Mink* v. *Shaffer*, 124 Pa. 280.

It will be presumed in the absence of an averment to the contrary, that the courts of a sister state have the authority they assume to exercise, and that the mode of procedure pursued by them, though different from that established by this state, was in accordance with the law and practice of such state.

Freem. Judgm. 3d ed. § 565; *Mills* v. *Duryee*, 11 U. S. 7 Cranch, 481, 3 L. ed. 411, 2 Am. Lead. Cas. 647.

If the record of a judgment of a sister state shows on its face that the court had jurisdiction of the appellant through a service of its process, its judgment must be taken by the courts of this state as *juris et de jure* and an affidavit of defense setting forth that deponent was not served or notified by the process in the original suit will not prevent the courts of this state from entering judgment.

Lance v. *Dugan*, 22 W. N. C. 132; *Wetherill* v. *Stillman*, *supra*.

Mitchell, J., delivered the opinion of the court:

How far section 1 of article 4 of the Constitution of the United States, and the Act of Congress of May 26, 1790, passed to carry it into effect, operate to preclude a defendant from offering evidence against the judgment of one state when sued upon it in another, has been the subject of much discussion and difference of opinion. A distinction has always been made, however, between facts going to the jurisdiction of the court and those relating to the merits, and the tendency has been strong to open the door to evidence upon the former. The earlier view was that the mere presumption in favor of jurisdiction might be contradicted, but that evidence could not be received against the affirmative recitals of jurisdictional facts in the record. In *Hampton* v. *M'Connel*, 16 U. S. 3 Wheat. 234, 4 L. ed. 378, *Chief Justice* Marshall said: "Whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States." And a similar view is indicated by the decisions in *Mills* v. *Duryee*, 11 U. S. 7 Cranch, 481, 3 L. ed. 411 (as to which see the remarks of Bradley, *J.*, in *Thompson* v. *Whitman*, 85 U. S. 18 Wall. 462, 21 L. ed. 899), and *Landes* v. *Brant*, 51 U. S. 10 How. 348, 371, 13 L. ed. 449, 459. "It was undoubtedly the purpose [of the constitutional provision] to give to the judicial proceedings of each state the same faith and credit in every other state to which they were entitled in the state in which they took place." Story, Const. § 1310, *note*. In *Thompson* v. *Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 897, however, the question came directly before the Supreme Court of the United States, and *Justice* Bradley, admitting that there was no previous express decision on the point, made an elaborate review of all the authorities, and announced for the court the conclusion that jurisdiction was always open to question, even upon facts affirmatively asserted in the record. This decision was affirmed and followed in *Knowles* v. *Logansport Gas-Light & Coke Co.* 86 U. S. 19 Wall. 58, 22 L. ed. 70, and *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565, and has been considered as settling the law, by the highest court, on the subject. The great weight of authority in the state courts is to the same effect, and so are the text books. *McDermott* v. *Clary*, 107 Mass. 501; *Gilman* v. *Gilman*, 126 Mass. 26, 30 Am. Rep. 646; *Wright* v. *Andrews*, 130 Mass. 149; *Grover & B. Sewing Mach. Co.* v. *Radcliffe*, 66 Md. 511; *Fairfax Forrest Min. & Mfg. Co.* v. *Chambers*, 75 Md. 614; *Enger* v. *Stoter*, 59 Mo. 87; *Napton* v. *Leaton*, 71 Mo. 358; Whart. Confl. L. § 823; Story, Confl. L. § 609; Story, Const. (M. M. Bigelow's ed. 1891) § 1310, *note a*; 13 Am. & Eng. Encyclop. Law, 1432, and cases there cited.

Our own cases have not been in entire harmony. In *Wetherill* v. *Stillman*, 65 Pa. 105, the earlier doctrine was enforced with great strictness, and, the record reciting an appearance by counsel, it was held—Sharswood, *J.*, dissenting—that an affidavit by defendant that he had never been served with process, or authorized any one to appear for him, was not sufficient to prevent judgment; Thompson, *Ch. J.*, saying: "The recital shows conclusively the jurisdiction of the parties; . . . consequently the defendant's affidavit in this particular amounted to nothing against the record to which it referred." In *Noble* v. *Thompson Oil Co.*, 79 Pa. 354, 21 Am. Rep. 66, however, it was held that, notwithstanding the recital in the record of an attachment *in rem* in New York, it might be shown that the property was not there, and the court therefore acquired no jurisdiction. And in *Guthrie* v. *Lowry*, 84 Pa. 533, it was distinctly held that, "whatever doubts may have been at one time entertained, it is now an incontrovertible position . . . that the record may be contradicted by evidence of facts impeaching the jurisdiction of the court;" citing, among others, the cases in 18 and 19 Wall., *supra*, though in the particular case the foreign court was held, as a matter of law, to have had jurisdiction. This would seem to be a formal recognition and adoption, even if partially *obiter*, of the later and presently prevailing doctrine. But in *Lance* v. *Dugan*, 22 W. N. C. 132, the court again reverted in a brief *per curiam* to the old rule, saying that, as the record showed a service on defendants, the judgment was conclusive, notwithstanding an affidavit in denial. In this condition of the law we have the point in the present case for final settle-

ment. Whatever our individual views upon the true spirit of the constitutional provision, we have no hesitation in conforming to the prevailing rule. It would be sufficient to say that it is now the established rule in the supreme court, which is the ultimate authority on all questions depending on the constitution and statutes of the United States. But, in addition to that, the same rule now prevails in the courts of a majority of the states, and it is a question on which uniformity is desirable. It would be contrary to sound policy to deny to our own citizens a defense against judgments obtained in other states out of a comity which such states refused to us. An apt illustration is afforded by the present case, in which it appears that the court of chancery in Maryland denied the appellant relief against the original judgment on the ground that the same defense would be open to him here. The affidavit of defense avers that the appearance recited in the record of the judgment sued on was merely constructive, and that in fact the appellant was not served with process, did not appear, and had no knowledge of the suit until recently, when demand was made upon him for payment. These being facts going to the jurisdiction of the court, the record could be contradicted in regard to them. The affidavit presented a prima facie defense, and was sufficient to prevent judgment.

Judgment reversed, and *procedendo* awarded.

MISSOURI SUPREME COURT (In Banc).

Louisa M. WALTON *et al.*, *Appts.*,
v.
Mary Katherine KENDRICK *et al.*, *Respts.*

(.....Mo.....)

1. Declarations by a testator after the execution of his will are not admissible to show due execution.

2. Some evidence that a testator's will was signed in his presence as well as by his direction so as to comply with the statute in a case where the testator does not affix his own signature is furnished by proof that he stated to the witnesses whom he asked to attest it that it was his will and that he had it written, while it appears that he was fully acquainted with all the formalities required by the statute.

(*MacFarlane, J., dissents from proposition 2.*)

(June 4, 1894.)

APPEAL by contestants from a judgment of the Circuit Court for Chariton County in favor of defendants, in a proceeding brought to contest the validity of an instrument purporting to be the last will and testament of John W. Price, deceased. *Reversed.*

The facts are stated in the opinions.

Messrs. **Crawley & Son**, for appellants:

The trial court erred in admitting the subsequent declarations of John W. Price, made to the witness, Sarah S. Kendrick, as proper evidence by which to establish the execution of the writing in controversy.

In the first place it was not proven, nor is it even fairly inferable from her testimony, that the paper to which Judge Price referred in the supposed conversation with Mrs. Kendrick, is the same paper now propounded as his will.

In the second place, though the identity of the paper be conceded, still, no subsequent declaration of the supposed testator in regard to it is admissible upon the issue of its due execution.

Schouler, Wills, 2d ed. § 317*a*; *Johnson* v. *Hicks*, 1 Lans. 150; *Jones* v. *McLellan*, 76 Me. 49; *Gibson* v. *Gibson*, 24 Mo. 227; *Cawthorn* v. *Haynes*, 24 Mo. 237; *Tingley* v. *Cowgill*, 48 Mo. 291; *Spoonemore* v. *Cables*, 66 Mo. 579; *Rule* v. *Maupin*, 84 Mo. 587; *Bush* v. *Bush*, 87 Mo. 480; *Jones* v. *Roberts*, 37 Mo. App. 181; *Kennedy* v. *Upshaw*, 64 Tex. 411; *Runkle* v. *Gates*, 11 Ind. 95; *Couch* v. *Eastham*, 27 W. Va. 796, 55 Am. Rep. 346; *Davis* v. *Davis*, 123 Mass. 590; *Caeman* v. *Van Harke*, 33 Kan. 333; *Kitchell* v. *Beach*, 35 N. J. Eq. 446; *Hayes* v. *West*, 37 Ind. 21.

The statement of the supposed testator to the persons who subscribed as witnesses, that the paper was his "will," cannot supply or dispense with proof that the previous signature was placed there in one of the only two ways pointed out by the statute.

Mo. Rev. Stat. 1889, § 8870; Mo. Rev. Stat. 1879, § 3962; *Catlett* v. *Catlett*, 55 Mo. 330; *Chaffee* v. *Baptist Missionary Convention*, 10 Paige, 85, 4 L. ed. 596; *Lewis* v. *Lewis*, 11 N. Y. 220; *Mitchell* v. *Mitchell*, 16 Hun, 97, 77 N. Y. 596; *Biker* v. *Woodbridge*, 66 Barb. 261; *St. Vincent de Paul Sisters of Charity* v. *Kelly*, 67 N. Y. 409; *Re Mackay*, 1 L. R. A. 491, 110 N. Y. 611; *Re Booth*, 23 N. Y. Week. Dig. 248; *Re Dale*, 56 Hun, 169; *Burwell* v. *Corbin*, 1 Rand. (Va.) 131, 10 Am. Dec. 494; *Asay* v. *Hoover*, 5 Pa. 21, 45 Am. Dec. 713; *Grabill* v. *Barr*, 5 Pa. 441; *Greenough* v. *Greenough*, 11 Pa. 489, 51 Am. Dec. 567; *Barr* v. *Graybill*, 13 Pa. 396; *Waite* v. *Frisbie*, 43 Minn. 361; 2 Greenl. Ev. 13th ed. § 676.

Where the entire document is written or the name of the testator is signed, by him, in his own handwriting, or where another indites the paper, and there is direct proof that it was signed for the testator, by his direction, in his presence, by a disinterested scrivener, then, if he acknowledges the genuineness of the signature to the subscribing witnesses, the authorities very justly hold this to be sufficient prima facie proof of the execution, notwithstanding none of the subscribing witnesses were present when the testator's name was actually signed.

Cravens v. *Faulconer*, 28 Mo. 19; *Grim* v. *Tittman*, 113 Mo. 56; *Way* v. *Brown*, 30 Ga. 808; *Ragan* v. *Ragan*, 33 Ga. Supp. 106; *Hol-*

NOTE.—As to signing will by proxy, see *note* to Lewis v. Watson (Ala.) 22 L. R. A. 227.

loway v. *Galloway*, 51 Ill. 159; *Scoules* v. *Plowright*, 10 Moore, P. C. C. 440; *Clarke* v. *Dunnavant*, 10 Leigh, 13; *Hall* v. *Hall*, 17 Pick. 373.

But where there is no positive proof that the paper was signed either by the direction, or in the presence, of the supposed testator; where no subscribing witness saw the act of signing, or heard the supposed testator declare that he had signed, or had directed another to sign for him; where the scrivener not only "writes herself an heir," but being an heir, signs as well as writes the paper under which she claims a lion's share of the supposed testator's property, something more is required to establish the "due execution" of the paper, than the mere acknowledgment or declaration of the supposed testator to subscribing witnesses that said paper is his "will."

Hughes v. *Meredith*, 24 Ga. 325, 71 Am. Dec. 127; *Gerrish* v. *Nason*, 23 Me. 438, 39 Am. Dec. 589; *Jones* v. *McLellan*, 76 Me. 49; *Delafield* v. *Parish*, 25 N. Y. 9; *Purdy* v. *Hall*, 134 Ill. 308; *Barry* v. *Butlin*, 1 Curt. Eccl. Rep. 637; *Panton* v. *Williams*, 2 Curt. Eccl. Rep. 530; *Barry* v. *Butlin*, 2 Moore, P. C. C. 480; *Scoules* v. *Plowright*, *supra*: *Lee* v. *Dill*, 11 Abr. Pr. 214; *Lake* v. *Ranney*, 33 Barb. 49; *Baker* v. *Woodbridge*, 66 Barb. 261; *St. Vincent de Paul Sisters of Charity* v. *Kelly*, 67 N. Y. 409; *Howland* v. *Taylor*, 53 N. Y. 627; *Re Bartholick*, 35 N. Y. S. R. 730; *Waite* v. *Frisbie*, 45 Minn. 361; *Re Booth*, 23 N. Y. Week. Dig. 248; *Riddell* v. *Johnson*, 26 Gratt. 162; *Harvey* v. *Sullens*, 46 Mo. 147; Schouler, Wills, 2d ed. § 245.

Messrs. **Tyson S. Dines and C. Hammond & Son,** for respondents:

The evidence of the execution of the will in this case shows full compliance with the statute.

Adams v. *Field*, 21 Vt. 256; *Lemayne* v. *Stanley*, 3 Lev. 1; *Knight* v. *Crockford*, 1 Esp. 190; *Dudleys* v. *Dudleys*, 3 Leigh, 436.

Not only did the testator state to Dr. H. H. D. Moorman, one of the attesting witnesses that "he had written," but he acknowledged the signed instrument, signature and all to be his will; and the witness saw his name written there. This was sufficient.

Baskin v. *Baskin*, 36 N. Y. 416; *Saunderson* v. *Jackson*, 2 Bos. & P. 238; *Schneider* v. *Norris*, 2 Maule & S. 286; *Sarah Mike' Will*, 4 Dana, 1; *Ellis* v. *Smith*, 1 Ves. Jr. 11; *Carleton* v. *Griffin*, 1 Burr. 549; *Roberts* v. *Welch*, 46 Vt. 164; *Knight* v. *Crockford*, and *Lemayne* v. *Stanley*, *supra*.

The question of the due execution of the will was a question of fact to be determined by the jury from the evidence. It was a fact that could be established by circumstances as well as direct proof; and there was ample evidence upon which to submit this question to the jury.

Grimm v. *Tittman*, 113 Mo. 56.

Where a testator declares to two subscribing witnesses that a paper to which his name is already signed is his will and then requests them to sign as witnesses, he sufficiently acknowledges his signature. "Nor is it necessary that the testator should say in express terms 'That is my signature.' It is sufficient if it clearly appears that the signature was existent on the will when it was produced to the witnesses and was seen by the witnesses when they subscribed the will."

Blake v. *Knight*, 3 Curt. Eccl. Rep. 547; *Keigwin* v. *Keigwin*, Id. 607; *Re Ashmore*, Id. 756; Jarman, Wills, 5th ed. p. 81; *Re Trenor's Estate*, 4 N. Y. Supp. 466; *Re Austin's Will*, 45 Hun, 1; *Clarke* v. *Dunnavant*, 10 Leigh, 13; *St. Louis Hospital Asso.* v. *Williams*, 19 Mo. 609; *Cravens* v. *Faulconer*, 28 Mo. 19; *Grimm* v. *Tittman*, *supra*; *Dudleys* v. *Dudleys*, 3 Leigh, 145; *Hall* v. *Hall*, 17 Pick. 373; *Nickerson* v. *Buck*, 12 Cush. 332; *Grayson* v. *Wilkinson*, 1 Dick. 158; *Grayson* v. *Atkinson*, 2 Ves. Sr. 454; *Addy* v. *Grix*, 8 Ves. Jr. 505; *Morison* v. *Turnon*, 18 Ves. Jr. 183; *Holloway* v. *Galloway*, 51 Ill. 159; *Crowley* v. *Crowley*, 80 Ill. 469; *Re Langtry's Will*, 24 N. Y. S. R. 472; *Baskin* v. *Baskin*, 36 N. Y. 416; *Re Bernsee's Will*, 71 Hun, 27; *Re Klett's Will*, 3 Misc. 385; *Dewey* v. *Dewey*, 1 Met. 349, 35 Am. Dec. 367; *White* v. *British Museum*, 6 Bing. 310; *Hogan* v. *Grosvenor*, 10 Met. 54; *Gamble* v. *Gamble*, 39 Barb. 373; *Rosser* v. *Franklin*, 6 Gratt. 1; *Paramore* v. *Taylor*, 11 Gratt. 220.

A will is sufficiently attested when subscribed by the witnesses in the presence and at the request of the testator, although none of them saw the testator sign, and only one of them knew what the instrument was.

Dewey v. *Dewey*, *White* v. *British Museum*, *Hogan* v. *Grosvenor*, and *Gamble* v. *Gamble*, *supra*.

In this connection we desire to call attention to the change in our statute of wills, and the decisions of the supreme court before and since the change.

Rev. Stat. 1845, chap. 185, § 5; *McGee* v. *Porter*, 14 Mo. 611, 55 Am. Dec. 129; *Northcutt* v. *Northcutt*, 20 Mo. 266.

That the draughtsman of a will takes a legacy under it, is suspicious only in connection with other circumstances indicating fraud or undue influence.

Coffin v. *Coffin*, 23 N. Y. 9, 80 Am. Rep. 235; *Barry* v. *Butlin*, 1 Curt. Eccl. Rep. 637.

The deposition of Mrs. Sarah S. Kendrick was certainly admissible in evidence under the issues of fraud by the pleadings.

The declarations were admissible in determining whether testator fully comprehended and approved the will.

Maxwell v. *Hill*, 89 Tenn. 584; *Beadles* v. *Alexander*, 9 Baxt. 604; *Linch* v. *Linch*, 1 Lea, 526.

They are admissible to show intention, purpose, mental peculiarity, and condition.

Shailer v. *Bumstead*, 99 Mass. 112; *Herster* v. *Herster*, 122 Pa. 239; *Harris* v. *Rhode Island Hospital Trust Co.* 10 R. I. 313; *Langham* v. *Sanford*, 19 Ves. Jr. 649, 31 Cent. L. J. p. 454.

The instruction is erroneous because it excludes evidence of the deponent which was of her own personal knowledge and not derived from the declarations of the testator.

31 Cent. L. J. p. 454.

Brace, J., delivered the opinion of the court:

This is a statutory proceeding instituted in the circuit court of Chariton county to contest the validity of an instrument of writing

purporting to be the last will and testament of John W. Price, late of said county deceased, duly admitted to probate in said county on the 28th of May, 1890, prosecuted by some of his heirs against a daughter of said deceased and her husband; the petition charging in substance that said paper writing so admitted to probate as the last will of the said deceased "was not written or signed by the said John W. Price, and was not signed by any other person for him, by his direction, in his presence, as provided by law: and that the said paper writing, by reason of the matter aforesaid, is not the will of John W. Price." Upon this allegation issue was joined by answer, and the case came on for trial at the October term, 1891, of said circuit court. After the jury had been impaneled and sworn, and the statutory issue framed by the court, the defendants produced said instrument of writing, which is in words and figures as follows, to wit:

"I, John W. Price, of the county of Chariton, and state of Missouri, being of sound and disposing mind, and knowing that I have to leave this world, as all mortal flesh is doomed to do, I feel anxious to dispose of my entire estate after my death. In accordance with my well matured determination I do hereby make, publish, and declare the following to be my last will and testament, viz.: In the first place, I bequeath my entire estate (except what I have already disposed of) to my wife, Mary E. Price, to use for the support of herself and the two youngest children, Mary Katherine Price and Wallace Powell Price. To my daughter Mary L. Harper I will one dollar, having advanced to her her portion of my estate. To my daughter Louisa M. Walton I will one dollar, having advanced to her her portion of my estate. To my daughter Harriet A. Vergin I will one dollar, having advanced to her and her children their portion of my estate. To my son Elmer D. Price I give the south half of my Huss farm, and to my son John Walter Price I will the north half of the Huss farm. To my daughter Aurelia Harding I will 160 acres of land on Yellow creek, the numbers of which can be found in my tax receipts. To my son William W. Price I will one dollar, having advanced to him his portion of my estate. My home residence, which I have given my wife, Mary E. Price, a lifetime control and possession, I give to my two youngest children, M. K. Price and W. P. Price, to be equal heirs of all my land estate that I have not given away in this, my will, and also all the land I may purchase before my death. I will my stock, household furniture, farm utensils, and all the money I have not disposed of to remain as they are, for the use of the homestead as long as my wife lives; after her death to be divided between the two youngest children. I give Mary Katherine Price the home residence in an equal division of all my land that may be attached to the home tract or not otherwise disposed of, which I have heretofore stated my wife, Mary E. Price, is to control her lifetime. I give my wife one third of my money after paying all my debts and what I have ordered in my will. I also appoint my wife executrix of my estate. I will that the probate court have nothing to do with my estate. Written this 18th of November, 1886. John W. Price. Witness: F. K. Venable. H. H. D. Moorman. John A. Broaddus. James D. Ingram."

—And in support thereof introduced the attesting witnesses, who testified in substance as follows:

James D. Ingram testified that he lived in Chillicothe, and in the winter of 1886 or 1887 he was at the residence of Mr. Price as a visitor. "In the morning, after breakfast, Mr. Price said: 'I am very glad that you came. I have been wanting to see you. I wanted you to witness my will.' And he produced that paper; just handed it to me. I did not read it. He said that was his will, and, looking at it, I said, 'You have already several names.' He said he wanted me also. I signed it, and he stated that was his will. The paper is in same condition now as then, with same names upon it. The name of John W. Price was to it then. I signed it as a witness. The other names are above mine. I signed it as a witness at Mr. Price's request." This witness on cross-examination testified that he was acquainted with the hand writing of John W. Price. The paper was not written in the handwriting of Mr. Price, nor was it signed in his handwriting. Witness thought both the body of the writing and the signature were in the hand of Mrs. Kendrick. When Mr. Price handed him the paper to sign as a witness he said it was his will. He signed it in the presence of Mr. Price.

F. K. Venable, another attesting witness, testified that he lived within half a mile of John W. Price, and knew him well. "Some time about the latter part of the year 1886,—I don't remember the month,—I was called upon to witness a paper presented to me as Judge Price's will. [Paper here exhibited to witness]. This is my signature attached to that paper. I did not read it. I only know that is my signature there. I only know this to be the same paper by the fact that I identify my signature. That is the only paper I ever signed for Mr. Price. I could not say whether the name of John W. Price was signed to it. I witnessed the paper he handed me and told me was his will. He told me that was his will, and I signed it." "Could not identify it only by my signature. If I am not mistaken, when he handed the paper to me he raised it up, and let it fall over, and told me that was his will, and that he wanted me to sign it as a witness, I believe. A day or two—probably three or four days—before that, he sent for me to come to his house when I had leisure. I went there, and he told me what his business was,—signing as a witness his will. I put my name there as a witness at his request, and in his presence. Did not see paper when written. Did not see him sign it. Did not know his handwriting.

J. A. Broaddus testified: "In the fall of 1886—I don't remember the month—I was called upon to witness Judge Price's will. [Here paper exhibited to witness]. This is the document I signed. Judge Price presented it to me. He said it was his will, and

he would like for me to sign it as one of the witnesses. I signed it in his presence. I was there perhaps thirty or forty minutes. When I signed the paper I didn't see anything. It was folded up, and handed to me to sign. I didn't read it. I didn't look at it at all. I think one or two names were there, perhaps, when I signed it. Dr. Moorman was one of the witnesses. This is my signature." Don't remember whether members of the family were there or not. Did not see Mr. Price sign the paper or write it. Was not present when it was written, nor when it was signed by him or by any one for him.

H. H. D. Moorman testified: "Am a physician. Practiced my profession at Dalton, Chariton county, for four years, commencing in the spring of 1884. Was well acquainted with the late John W. Price. During my practice at Dalton, was often called to visit him and his family professionally. Am one of the persons whose names appear as attesting witnesses to the paper recently probated as his will in the Chariton county probate court. I signed the paper at Price's request, and in his presence, but did not see him sign it, nor was his name signed to it by any other person in my presence. His name was already written at foot of paper when I first saw it. He handed me the paper, and said, 'This is my will, and I want you to sign it as a witness.' He said he had it written, but I don't remember that he said by whom. He was then of sound mind."

The proponents then introduced in evidence the deposition of Sarah S. Kendrick, which so far as it bears upon the present inquiry, is as follows: "Am sixty years old. Knew John W. Price well. He stayed a week here (at my house) a good many times, and I spent as much as two weeks with him a good many times. His wife was my step-daughter. I knew him for eighteen years. *Q.* I will get you to state if, about the year 1886, or some time after that you ever had any conversation with him about this will. *A.* Yes, sir, I was there. I do not know how long after he made his will. I could not say. He came in, and said, 'Mrs. Kendrick, I have made my will.' I said to him, 'Did you sign the will, Mr. Price?' He said: 'No, I didn't sign it. I told Katie to write it, and I saw her do it.' *Q.* You [he] said, when you asked him whether he signed it or not, that he told Katie to write it? *A.* Yes, sir; but he saw her do it. He told her to write his name. The condition of his mind was good, very good, at the time of these conversations. He knew everything he had, just as well as I. Was a remarkably smart man, Mr. Price was. You don't often see just such a man." Cross-examined: "*Q.* Can you fix the date of your conversation? *A.* I could not, sir. *Q.* At the time of this conversation with Judge Price about his will, when he told you he had made a will, how long before that did he tell you he executed a will? *A.* He did not say. *Q.* Did he say how long the will had been executed? *A.* No, sir; just as I told you. *Q.* How long before Judge Price's death was it that this conversation occurred? *A.* I could not tell you, to save my life. *Q.* What was the condition of his health at that time? *A.* Pretty good. He came in from his work in the garden. *Q.* What was the exact language he used to you about the writing of the will? *A.* I asked Mr. Price who wrote the will, and he says, 'I wrote the will, but Katie copied it.' *Q.* Then what else did you ask him? *A.* I says, 'Mr. Price, they will break your will.' He says 'They cannot do it; I have given every one something.' I says, 'Mr. Price, did you sign the will?' He says: 'No, I did not sign the will. Katie wrote my name, and I saw her do it.' *Q.* Is that all he told you about the writing of the will? *A.* All that I have stated to you is all that he stated, as near as I can give it. *Q.* As I understand, then, he wrote it, Katie copied it, and Katie signed it? *A.* He told her to do it, and he saw her do it. *Q.* Are you positive he said he told her to do it? *A.* Yes, sir; I have sworn to that, and could do it again. Judge Price met with a railroad accident some years before that. Katie did most of his writing. Don't think he consulted anybody about his business much. He was a man of fine sense. Don't think he relied on the advice of any member of his family in regard to business. Won't say that he transacted his business himself. Don't know exactly. Never saw him call on anybody to transact business. Have seen him call on Kate to put his name to a paper or write an article. Never heard him call on anybody to consult. He thought himself as capable as anybody. At times he was a great sufferer; an invalid. Had neuralgia very bad. Several times his side rose. He had a rising in one of his sides, and was a great sufferer. About this time I was at his house sometimes once a month, sometimes once in two months. Could not tell the exact time. My visits were sometimes for a day or two, sometimes two weeks and more. Judge Price used narcotics, whiskey, like any other man. Sometimes he used it to relieve pain. Do not know as to his taking opiates. Never saw him take any. *Q.* Was he not frequently in a semi-unconscious condition, so that he would scarcely notice anything going on around him? *A.* I have seen him on two occasions when they gave him too much whiskey. *Q.* Were there not other occasions when he paid no attention to what was taking place? *A.* I could not say. I do not know. *Q.* Who was the attendant who brought these stimulants and gave them to him"? *A.* His wife and his daughter. *Q.* At the time you speak of when he had too much whiskey, and was in the condition you describe, do you know who gave it to him? *A.* I suppose it was either Bettie [his wife] or Katie. I do not know. One of the two, Nobody else did. Judge Price kept his valuable papers in the drawer of a bureau in his house. I do not think every one had access to the drawer. I do not know whether it was locked or not. Think it was. He was a money lender. Had no office except his home. Do not know who transacted for him the business of loaning money, receiving interest, and giving receipts. Never saw any of his business transacted when I was there."

To the introduction of so much of this

deposition as contained declarations made by the testator in regard to the execution of the will, the contestants objected, and, their objection being overruled, they excepted. Upon the proof thus made proponents offered in evidence the instrument of writing as the last will of said deceased, and over the objection of the contestants the same was permitted to be read to the jury, to which action and ruling they excepted. Thereupon the proponents rested. The contestants introduced no evidence, but asked the court to give the following instructions: "(1) The court instructs the jury that it has not been proven that the paper writing read in evidence was signed by John W. Price, the supposed testator, or by any other person for him at his request, or by his direction, and in his presence: and you are therefore instructed that your verdict must be that said paper writing is not the will of John W. Price. (2) The court instructs the jury that the testimony of Mrs. Sarah Kendrick, contained in her deposition read in evidence, should not be considered by you for any other purpose than to show the mental condition and state of the affections of John W. Price, and that the said testimony is not competent for the purpose of proving that the said John W. Price executed the paper propounded as his will,"—which the court refused. The contestants excepted, and the case was submitted to the jury, who found the issue for the proponents, and upon this verdict the said instrument of writing was by the judgment of the court established as the last will of said Price, from which judgment the contestants appeal.

The errors assigned are substantially: First. That the court erred in overruling the objections to all that part of the deposition of Mrs. Kendrick relating to declarations concerning the execution of his will made to said witness by John W. Price after the date of the supposed execution thereof, and in refusing the second instruction in regard to her evidence. Second. That the court, upon the proof made, permitted the will to go to the jury, and refused to give the first instruction.

1. The errors under the first head are disposed of in a satisfactory manner by Macfarlane, *J.*, in the first paragraph of the opinion handed down in division one, as follows: "(1) Since the decision of *Gibson* v. *Gibson*, 24 Mo. 234, it has been the settled law in this state that declarations of the testator made subsequent to the execution and publication of the will are not admissible as evidence of the fact stated. In his able and exhaustive opinion in that case *Judge* Leonard sums up the law in reference to such declarations as follows: 'The just result of the whole matter, we think, is that these declarations, so far as they are relied upon to furnish evidence of the facts they contain, are mere hearsay, and that there is no ground, either of authority or reason, to exempt them from the rule of law excluding all such testimony. We repeat, however, what we have before remarked, that as mere verbal facts, external manifestations of what is passing within, they are always evidence of the testator's intellect and affections for the time being, provided they are of such a character, either by themselves or in conjunction with other evidence, and are so connected with the making of the will in point of time, as to furnish any reasonable ground of judgment in reference to the testator's mental condition at that time.' This opinion is so conclusive and satisfactory that it has been adopted and followed in this state without question or comment wherever the question has been raised. *Tingley* v. *Cowgill*, 48 Mo. 298; *Rule* v. *Maupin*, 84 Mo. 589; *Bush* v. *Bush*, 87 Mo. 485; *Spoonemore* v. *Cables*, 66 Mo. 587. In the case last cited *Judge* Napton contents himself by saying, 'We have nothing to add to what was there said.' Schouler, in his work on Wills, disposes of the subject in one brief section as follows: 'The declarations of a testator before or after making a will are inadmissible on the issue of its execution.' Section 317*a*. To the same effect, see *Jones* v. *McLellan*, 76 Me. 49; *Kennedy* v. *Upshaw*, 64 Tex. 411; *Runkle* v. *Gates*, 11 Ind. 95; *Davis* v. *Davis*, 123 Mass. 590; *Kitchell* v. *Beach*, 35 N. J. Eq. 446; *Herster* v. *Herster*, 116 Pa. 612; *Caeman* v. *Van Harke*, 33 Kan. 333; *Johnson* v. *Hicks*, 1 Lans. 150; and *Couch* v. *Eastham*, 27 W. Va. 796, 55 Am. Rep. 346. In the case last cited, the court, after exhaustive review of the authorities, says, 'We have not found a single case that warrants the introduction of such evidence.' Under the law, thus well settled, we can but conclude that the declarations of John W. Price, as testified to by Mrs. Kendrick, bearing upon the execution of the will, were inadmissible." The declarations of the deceased being excluded from the deposition, there was nothing in the case calling for an instruction upon that subject; consequently the second instruction, which should have been confined to those declarations, was properly refused. This brings us to the real difficulty in the case, which arises under the second head of the assignment of errors.

2. Our statute requires that "every will shall be in writing, signed by the testator, or by some person by his direction, in his presence, and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator." Rev. Stat. 1889, § 8870. That this statute is imperative, and that no instrument can be established as a will without a substantial compliance with its requirements, is beyond question. *Catlett* v. *Catlett*, 55 Mo. 330. Whether they have been complied with or not is a question of fact to be determined by the jury upon legal evidence in a proceeding under the statute to contest the validity of a probated instrument, when a jury is required, as in the present case. Rev. Stat. 1889, §§ 8888, 8889. The province of the court before whom the issue was tried, and whose action alone is subject to our review, was not to determine the sufficiency of the evidence to establish the facts essential to a due execution of the will, or the credibility of the witnesses giving it,—this belonged exclusively to the jury,—but to submit that issue to the jury when a prima facie case was made by competent legal evidence tend-

ing to prove that all the requirements of the statute had been complied with. And the immediate question before us is, Was the evidence hereinbefore set out, minus the declarations made to Mrs. Kendrick, sufficient to make out a prima facie case of proper execution of the instrument, and to warrant the court in submitting that issue to the jury? The case made by that evidence, briefly, is that Judge John W. Price, aged about seventy four years, of sound mind, a money lender, an intelligent man, of property, and conversant with affairs, but who had some years before met with a railroad accident, and was suffering from neuralgia and "risings" in one of his sides, and had to rely upon his daughter Katie, one of the respondents, to do most of his writing, was in the fall of 1886 living with his family at his home in Chariton county, and had then in his possession the instrument of writing propounded as his last will, which, upon its face, bears evidence that it was prepared under the direction of a mind familiar with such matters. This instrument, in apt language and in due form, with his name signed in the proper place at the bottom of it, all, including the signature, in the handwriting of his daughter Katie, he first presents to his near neighbor Venable, whom he had requested to call for that purpose, to whom he said in substance: "This is my will. It is not necessary that you should read it. I want you to sign it as a witness." The witness attests it, and departs. On a subsequent day he presents the same instrument, also at his home, to Moorman, his family physician, and says: "This is my will. I had it written, and I want you to sign it as a witness." That witness attests it, and departs. Subsequently he presents the same instrument, at the same place, to another neighbor, Broaddus, whom he had called to witness his will, to whom he said it was his will, and he would like him to sign it as one of the witnesses, and that witness attests it. Subsequently, his old friend and relative Ingram, being at his house on a visit, he presents the same instrument to him, tells him that it is his will, and that he wants him to witness it, and he attests it. These repeated declarations of Judge Price, who may reasonably be inferred from the evidence to have known the requirements of the statute, made in the most solemn manner, in performing the most solemn act of his life, when considered in the light of all the circumstances by which he was surrounded when they were made, and when the instrument was written, and his name signed thereto, surely, in reason, must afford some evidence that his name was signed to the instrument by his direction, and in his presence. Yet in the face of the case thus made counsel for contestants contend that there is in this record no proof whatever that the name of John W. Price was so signed. The cases to which we are cited in support of this proposition from other jurisdictions, except *Burwell* v. *Corbin*, 1 Rand. (Va.) 131, 10 Am. Dec. 494, are under variant statutes, differing from ours, as are many of those cited for the proponents, and shed but little light upon the controversy. The single case cited from this court—*Catlett* v. *Catlett*, *supra*,—gives it no support whatever, for in that case the instrument propounded was not signed at all, and the point ruled was simply that the signing required by the statute was the affixing of the testator's name at the bottom of the will, either in his own handwriting or in that of some one else in his presence, and by his direction. The Virginia case of *Burwell* v. *Corbin*, under a statute like ours, which is almost a literal transcript of 29 Car. II., in respect of the matter in hand, does give support to plaintiffs' contention but this was the decision of a divided court upon a special verdict, vigorously dissented from by *Judge* Roan, and virtually overthrown, after being much thrashed over in subsequent cases, in the Virginia court of appeals, all of which are cited in the notes to 3 Lomax, Dig. (2d ed.) pp. 44-49, §§ 14-16, where the cases are reviewed, and the doctrine of the Virginia cases under that statute, so far as it is pertinent to the present inquiry, correctly stated by *Judge* Lomax to be: "That the instrument, whether signed by the testator himself or by another person for him, is sufficiently attested upon the acknowledgment of the testator that such instrument is his will; that proof of such an acknowledgment is evidence from which a court of probate or a jury may infer the fact that the instrument was signed by the testator, or was signed by another person for the testator in his presence, and by his direction, as the case may be." The question in hand early came under the consideration of the supreme court of Kentucky, under a like statute (2 Dig. Ky. Stat. 1822, p. 1242), in the case of *Cochran's Will* (decided in 1814), 3 Bibb, 491, in which that court held: "The subscribing witnesses all prove the acknowledgment of the testator that this instrument was his will, and in his presence attested the same. This is a substantial compliance with the law. A will written and signed by the testater himself, attested by the proper number of witnesses, who can prove its execution only from the acknowledgment of the testator at the time of their attestation, though they did not see him sign it, and his handwriting could not be proved, yet, it is believed, would be held sufficient. And it is conceded that proof of the testator's name being signed by another under his direction, who proves that fact, cannot operate more unfavorably to the validity of the will than when proof of the signature or by whom it was written cannot be made, provided the requisite number of witnesses have attested it, and prove the acknowledgment of the testator, at the time of their attesting it as his will." The doctrine here announced has been uniformly maintained in the subsequent decisions in that state under the statute. *Shanks* v. *Christopher* (1820) 3 A. K. Marsh. 144; *Sarah Miles's Will* (1836) 4 Dana, 1; *Upchurch* v. *Upchurch* (1855) 16 B. Mon. 102. The Virginia statute seems to have been the common source from which the Kentucky statute of wills (1797, *supra*) and that of Missouri were originally taken (2 Mo. Laws 1825, p. 790), and all are substantially enactments of the English statute.

While the precise question under consideration has never been directly and authoritatively passed upon in this state, yet the principles decisive of it seem to have been well settled in harmony with the rulings in the English courts and those of Virginia and Kentucky. In *Cravens* v. *Faulconer* (1859) 28 Mo. 19, this court, speaking through Richardson, *J.*, said: "It is manifest that the provision of our act in question was borrowed from the British statute, which has so often been under the consideration of their courts that it has become well settled by a long continued and uniform construction, which we cannot disregard. The witnesses must subscribe their names in the presence of the testator, in order that they may not impose a different will on him; but it is not necessary that they shall attest the very act and factum of signing by the testator. Though he must do some act declaring it to be his will, no particular form of words is required, and it is uniformly held that it is not necessary that the testator shall actually sign his name to the will in the presence of the attesting witnesses, but the acknowledgment by a testator that the name signed to the instrument is his, or that the paper is his will, is sufficient. 1 Jarman, Wills, 72; 1 Pow. Dev. 83; 4 Kent, Com. 576; 2 Greenl. Ev. § 676." To the same purport is the recent case of *Grimm* v. *Tittman*, 113 Mo. 57. The principle announced in all these cases is simply a recognition and affirmance of the doctrine laid down in *Ellis* v. *Smith*, 1 Ves. Jr. 11, decided in 1754 by the high court of chancery of England, after a review of all the precedents, and which was thereafter uniformly followed in the English courts so long as the Statute of Charles II. on this subject remained unchanged. From the authorities on this statute, English and American, but one deduction can be logically drawn, and that is that an instrument of writing purporting to be the will of a person of sound mind and lawful age, signed at the bottom with the name of the testator, and attested by the requisite number of witnesses in his presence, may be established as his last will and testament on the evidence of such attesting witnesses that he acknowledged before each of them, separately or together, that such instrument was his will, without further proof. The application of this principle does not depend upon the physical fact of signing. It applies all the same whether the instrument was signed by the testator by his own hand, or by that of another at his request and in his presence. The acknowledgment has just the same probative force in the one case as in the other, and the removal of that probative force as to either mode by other proof that it was not signed in one of these ways does not and cannot destroy the probative force of the acknowledgment that it was signed in the other way, and to prove that the signature to a will thus acknowledged was not in fact made by the hand of the testator has no more tendency to prove that the will was not signed by another at his request, in his presence, than proof that it was not so signed by another has to prove that it was not signed by the testator in his own proper hand. This is not "consequence built upon consequence," but an inevitable and immediate deduction from the premises. It is not the mere physical act of signing that the witnesses attest; it is that the instrument signed with the name of the testator is his will. *Withinton* v. *Withinton*, 7 Mo. 589; *Cravens* v. *Faulconer*, *supra*; *Harris* v. *Hays*, 53 Mo. 90; *Norton* v. *Paxton*, 110 Mo. 456; *Grimm* v. *Tittman*, *supra*. That fact they are warranted in attesting upon the declaration of the person whose name is signed to the instrument (he being of sound mind and lawful age) that the instrument so signed is his last will and testament, although they neither saw him subscribe his own name to it in proper person, nor another subscribe his name thereto at his request, and in his presence. Proof of this acknowledgment by the deceased before the required number of attesting witnesses, made by them, that he was of lawful age and sound mind, and that they signed their names as witnesses to the instrument in his presence and at his request, under our law, makes a prima facie case, entitling the instrument to go to probate in the first instance, and upon a contest under the statute makes a case entitling the instrument to go to the jury as prima facie the will of the testator. To them is then intrusted the solemn duty of finally determining upon the whole evidence whether the instrument is the will of the testator, which it cannot be unless signed in one or the other modes designated by the statute. That it was so signed, however, need not be proved by positive and direct testimony, but may be established, as any other fact, by circumstances from which it may be legitimately inferred, of which the acknowledgment must always be one of the most convincing that it was in fact signed in one or the other of the modes provided for by the statute. For a decade in the history of Missouri the law in regard to wills signed by another for the testator was different, requiring additional proof in such cases. In the Revision of 1845 (chap. 185, § 5) a new section was adopted, requiring that "every person who shall sign the testator's name to any will by his direction, shall subscribe his own name as a witness of such will, and state that he subscribed the testator's name at his request." It was under this statute that the cases of *McGee* v. *Porter*, 14 Mo. 615, 55 Am. Dec. 129; *St. Louis Hospital Asso.* v. *Williams*, 19 Mo. 609; and *Northcutt* v. *Northcutt*, 20 Mo. 266,—were decided; and even under that statute it was held that there need not be an express direction, but that such direction might be proved by circumstances. 19 Mo. 612. It needed, however, but a brief experience of the dangers of innovation upon well-established and well-understood rules for the government of persons who in contemplation of death desired to make disposition of their property by will, as illustrated in those cases, to induce our lawmakers to return to the well-approved methods of their fathers, and this section was dropped from the Revision of 1855, and never since has found a place among our statutes.

From the evidence in this case there is rea-

sonable ground for the inference that *Judge* Price was familiar with the statute, and knew its requirements. There can be no doubt that he intended the instrument to be his last will and testament, and thought it was executed in accordance with its requirements; and all the evidence in the case tends to show that it was. His testamentary intentions ought not to be defeated by a narrow and technical construction of the statute, and cannot be defeated by evidence which tends to prove that his will was not signed in one of the ways provided by the statute, but which in no way tends to prove that it was not signed in the other, but tending strongly to prove that it was so signed. We therefore conclude that the trial court committed no error in refusing contestants' first instruction, nor in permitting the instrument to go to the jury on the prima facie case of its proper execution made by the evidence introduced by proponents. So that the only error we find in the trial was the admission of the declarations of the testator as to the manner in which the will was signed. As the acknowledgment of the testator is not conclusive evidence that the instrument was executed in the mode provided by the statute, but only evidence from which the jury would be warranted in inferring that the instrument was so executed, and as in this case they might not have drawn such inference but for this evidence, notwithstanding the acknowledgment was strengthened by the other facts and circumstances in evidence, *the judgment*, for this error, *will have to be reversed*, and the cause remanded for new trial, and it is accordingly so ordered.

All concur, except **Barclay**, *J.*, absent and **Burgess**, *J.*, not sitting. **Gantt**, and **Sherwood**, *JJ.*, concur in this opinion; **Black**, *Ch. J.*, and **Macfarlane**, *J.*, each in separate opinions.

Black, *Ch. J.*, concurring:

As said by this court when speaking of our statute concerning wills: "It is uniformly held that it is not necessary that the testator shall actually sign his name to the will in the presence of the attesting witnesses; but the acknowledgment by the testator that the name signed to the instrument is his, or that the paper is his will, is sufficient;" nor is it necessary that the witnesses shall sign in the presence of each other. *Cravens* v. *Faulconer*, 28 Mo. 19. As to the attestation, it can make no difference whether the will is signed by the testator himself, or by some other person by his direction and in his presence. In either case the attestation is good and sufficient if the testator acknowledges the instrument to be his will, and the witnesses sign it in his presence. In short, the witnesses attest a signed will, and not necessarily the various steps leading to its execution. This, it seems to us, is the necessary result of the rulings of the courts, often repeated, that the witnesses need not attest in the presence of each other, or attend the ceremony of signing by the testator. A will may be well attested though the attesting witnesses cannot depose to all the facts essential to a good signing by or for the testator. This is especially true in cases like the one in hand, where the name of the testator was not signed by himself, but was signed by another. Where the testator produces an instrument purporting to be his will, and declares that it is his will, and requests the witnesses to attest it, the declaration to them that the instrument is his will is evidence that he signed it; and, should it appear that he did not sign it himself, but that his name was signed thereto by another, the declaration is still evidence that his name was signed thereto by his direction: but in such case we do not see how his declaration, standing alone, can be any evidence that the name of the testator was signed in his presence. To so hold is to build up a presumption from a presumption. In the case in hand it clearly appears the testator did not sign his name to the paper propounded as his last will. His name was signed by another. He, however, presented it thus signed to the several attesting witnesses, and declared to each of them that the paper was his will, and the witnesses attested it at his request. This declaration of the testator that the instrument was his will, as shown by the testimony of the attesting witnesses, is evidence tending to show that his name was signed thereto by his direction; but, standing by itself, it does not, in our opinion, show or tend to show that the testator's name was signed in his presence. The question, then, is whether there is any other evidence in the case which justified the court in submitting the issue to the jury. The other circumstances in evidence are these: The will, including the name of the testator, was written by his daughter Katherine. The will bears date the 18th November, 1886, and was attested about the same date. Some of the attesting witnesses signed it in the presence of the wife of the testator and other members of the family as well as in the presence of Mr. Price. It was in the possession of the testator from the date thereof until his death, in April, 1890. One attesting witness says: "He said he had it written, but I don't remember that he said by whom." Another witness in the case, though not an attesting witness, testified: "Have seen him call on Katie to put his name to a paper or write an article." The will was evidently dictated from first to last by the testator himself, and there can be no doubt but he intended it to take effect as his last will. Taking these circumstances all in all, we think there is evidence from which a jury might properly draw the conclusion that the daughter signed the name of her father to the will in his presence. The testator possessed more than ordinary business capacity. The will was the result of his own judgment, and his name was written thereto by his direction. He intended the instrument should take effect as his will. There is no evidence tending to show that his name was not signed in his presence. Under these circumstances, the will ought not to be rejected, as a matter of law, if there is any evidence tending to show that his name was signed in his presence. We think the fact that this will was prepared according to his dictation at his own house, by

his daughter, who signed his name to other papers when requested to do so, is some evidence that she signed her father's name to this instrument in his presence. The case made is therefore one for the jury, in the opinion of the writer.

Macfarlane, J., dissenting:

It is not insisted that the formalities required by the statute in order to the due execution of a will can be dispensed with, and the mere acknowledgment of the testator substituted therefor. In order, therefore, to give effect to the statute in case the name of the testator is subscribed by another for him, it is essential to the perfection and validity of the instrument that it be signed by the direction of the testator, and in his presence. That being so, it follows that a writing not so signed cannot be given validity by adoption, however solemnly made. If the name of Col. Price was not, in fact, written in his presence, and at his request, it was not his will; and no declaration afterwards made by him to the contrary would change its legal character or effect. I understand the majority of the court agree to these propositions. It is also well settled that the burden of proof is on the proponents of the will to prove its due and legal execution. *Norton* v. *Paxton*, 110 Mo. 456; *Gay* v. *Gillilan*, 92 Mo. 255; Schouler, Wills, § 239. I agree that the sole question on this branch of the case is whether there was competent, legal evidence, offered by proponents, sufficient to make prima facie proof that the instrument in question was executed in the manner prescribed by the statute. I agree that the declarations of the testator, made at the time of the attestation of the will, were admissible as part of the *res gestæ*. When witness Moorman attested the writing, Col. Price stated that he had it written. This declaration, I may admit, tended to prove that the instrument was both written and signed by the direction of the testator, but I think no one can fairly claim that it, taken alone, had the remotest tendency to prove that the name was subscribed thereto in his presence. When we undertake to make the simple declaration of Col. Price that the instrument was his will evidence that it was executed under all the formalities required by the statute, we virtually throw aside the statute altogether, and make a will by mere adoption. We could with equal propriety dispense with the attestation of witnesses. The evident design of the statute, in requiring these formalities, when the name of a testator was written by another, was to prevent, as far as possible, the perpetration of frauds and impositions upon the ignorant and illiterate. But the statute does not confine its requirements to that class of persons. The requirements apply equally to the educated and intelligent business man. Nor are the rules of evidence, or its weight, given flexibility to suit the intelligence or ignorance of the testator. I have no doubt that the paper declared by Col. Price as his will made a disposition of his property according to his intention and wishes. Had he been unable to read or write, and barely competent to make a will, and had the daughter who wrote the will and signed his name to it been the principal legatee, to the substantial disinheritance of brothers and sisters, no more and no less evidence of its execution would have been required. More weight would doubtless be given to the declarations of an intelligent than to those of an ignorant person, but the competency of the evidence of each would be the same. I am unable to see that the declaration of Col. Price had the least tendency to prove that his name was signed to the writing in his presence, notwithstanding his intelligence, his business capacity, and his strong will. These could only give weight to declarations, which would have been evidence if spoken by the most illiterate. If a declaration does not tend to prove a fact, the character of the person making it is wholly immaterial.

The other circumstances shown by the evidence are that the testator, from bodily affliction, was unable to write with ease, and his daughter Mrs. Kendrick generally acted as his amanuensis. They lived in the same house. The will was written some years before the death of the testator, and during the time was kept in his possession. This evidence tends to prove that the will was written and signed by direction of the testator, and that he was satisfied with the disposition he had attempted to make of his property; but I am at a loss to see the least tendency it has to prove the fact that the will was signed by Mrs. Kendrick in his presence. The circumstances were as consistent with one theory as the other. They tended to prove neither. The burden of proof was on the proponents. I think there was no evidence tending to prove the due execution of the will, and therefore I do not concur in the second paragraph of the majority opinion, or in the concurring opinion of the learned chief justice.

MARYLAND COURT OF APPEALS.

NORFOLK & WESTERN R. CO., *Appt.*,
v.
William HOOVER.

(.....Md.....)

1. **The master's knowledge of the bad reputation for intemperance of a person employed** as brakeman on a train is not necessary to render him liable for injuries caused by the brakeman's unfitness, if he was negligent in not knowing of such reputation.
2. **Evidence of the general reputation for intemperance of a railroad brakeman** is admissible on the question of the negligence of the master in employing or retaining him.
3. **A train dispatcher with power to employ and discharge flagmen and brakemen,** and having general charge of the trainmen of one division, and movement of trains thereon, but without power to employ enginemen and firemen,—is the fellow servant of an engineman who is injured in consequence of the train despatcher's negligence in sending incompetent or unfit brakemen with the train.
4. **In the absence of a special exception** signed and sealed by the judge, an objection that there is no evidence to support an instruction will not be considered on appeal.
5. **An instruction that the master is liable for negligence in employing unfit trainmen,** if an injury results from the incompetence of a brakeman, is erroneous, as it is not limited to a case of negligence in the employment of the brakeman.

(June 12, 1894.)

APPEAL by defendant from a judgment of the Circuit Court for Washington County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by negligence for which defendant was responsible. *Reversed.*

The facts are stated in the opinion.

Mr. **Hy. Kyd. Douglass** for appellant.

Messrs. **M. L. Keedy** and **W. C. Griffith** for appellee.

NOTE.—*Liability of master for injuries caused to one servant by the incompetency of a fellow servant.*

1. *Employment generally.*
2. *Retention in employ.*
3. *Incompetency through use of liquor.*
4. *Pleading incompetency.*
5. *Evidence.*
   a. *Generally.*
   b. *Specific acts.*
   c. *Notice to company.*
   d. *Burden of proof.*

1. *Employment generally.*

A master is required to furnish to his employés competent fellow servants, and a failure to perform this duty through want of reasonable care on the part of the master is negligence on his part, and a master is liable to a servant for injuries received through the incompetency of a fellow servant, if the master did not use reasonable care in the employment of such servants causing the injury. This liability is an exception to the general rule that a master is not liable to his servants for the negligence of a fellow servant. (Brakeman injured by act of engineer) Tyson v. South & North Ala. R. Co. 61 Ala. 554, 32 Am. Rep. 8; (brakeman injured by act of brakeman) Chicago, St. L. & P. R. Co. v. Champion (Ind.) Jan. 10, 1894; (brakeman injured) Sweat v. Boston & A. R. Co. 156 Mass. 284; (brakeman injured by act of flagman) Bossout v. Rome, W. & O. R. Co. 82 N. Y. S. R. 881; (brakeman injured by act of telegraph operator) Wabash R. Co. v. McDaniels, 107 U. S. 454, 27 L. ed. 605; (carpenter injured through act of pile driver engineer) Texas Mexican R. Co. v. Whitmore, 58 Tex. 276; (carpenter injured by child superintendent) Henry v. Brady, 9 Daly, 142; (carpenter injured by act of foreman) Bunnell v. St. Paul, M. & M. R. Co. 29 Minn. 305; Slater v. Chapman, 67 Mich. 523; (conductor injured by act of engineer) Harper v. Indianapolis & St. L. R. Co. 47 Mo. 567, 4 Am. Rep. 353; (engineer injured by act of brakeman) Mann v. Delaware & H. Canal Co. 91 N. Y. 495; (engineer injured by act of engineer) Newell v. Ryan, 40 Hun, 226; (engineer killed by act of engineer) Pennsylvania Co. v. Roney, 89 Ind. 453, 46 Am. Rep. 173; (section boss injured through act of engineer) Cincinnati, H. & I. R. Co. v. Madden, 134 Ind. 462; (fireman injured by act of mechanic repairing engine) Mobile & O. R. Co. v. Thomas, 42 Ala. 672; (fireman injured by act of switchman who could not read time-table) Taylor v. Western Pac. Co. 45 Cal. 323; (laborer injured by act of engineer) Fitzpatrick v. New Albany & S. R. Co. 7 Ind. 436; Cayzer v. Taylor, 10 Gray, 274, 69 Am. Dec. 317; Colorado Midland R. Co. v. O'Brien, 16 Colo. 212; (laborer injured by fellow workman in a gin factory) Foncs v. Phillips, 39 Ark. 17, 43 Am. Rep. 264; (laborer injured by workman in removing fly-wheel) McElligott v. Randolph, 61 Conn. 157; (laborer injured by fellow laborer in mill) Indiana Mfg. Co. v. Millican, 87 Ind. 87; (laborer injured by act of carpenter) Haworth v. Seevers Mfg. Co. (Iowa) Feb. 18, 1892; (laborer injured by act of laborer) Nordyke v. Van Sant, 99 Ind. 188; Fines v. Sillery, 73 Hun, 549; (switchman injured by act of engineer) Chesapeake, O. & S. W. R. Co. v. McMannon (Ky.) 33 Am. & Eng. R. R. Cas. 308; (laborer injured by laborer with dynamite) Stewart v. New York, O. & W. R. Co. 28 N. Y. S. R. 215; (laborer injured by act of physician) Richardson v. Carbon Hill Coal Co. 20 L. R. A. 338, 8 Wash. 52; (snow shoveler injured by act of engineer) Wall v. Delaware, L. & W. R. Co. 54 Hun, 454; (switchman injured) Indianapolis & St. L. R. Co. v. Johnson, 132 Ind. 352; (track hand injured by act of road-master) Chicago & G. E. R. Co. v. Harney, 28 Ind. 28; (employé injured by act of engineer) Blake v. Maine Cent. R. Co. 70 Me. 60, 35 Am. Rep. 297.

Under Kansas Law of 1874, chapter 93, and Iowa Laws of 1862, a railroad company is liable to a servant for injury caused by negligence of fellow servant. Kansas Pac. R. Co. v. Peavey, 34 Kan. 472; Kroy v. Chicago, R. I. & P. R. Co. 32 Iowa, 357; Hunt v. Chicago & N. W. R. Co. 26 Iowa, 363.

And under 43 & 44 Vict., chapter 42, a master is liable to a servant for injury caused by negligence of fellow servant.

A railroad is negligent in selecting a freight conductor of one month's experience to act as conductor of wild train without examination as to his fitness. Evansville & T. H. R. Co. v. Guyton, 115 Ind. 450.

And a railroad company is negligent in allowing the track to stand for ten hours after heavy freshets without any one to guard washout, allowing train to pitch into it, although they claimed the section

McSherry, J., delivered the opinion of the court:

This is an action brought to recover damages for personal injuries received by the appellee, an employé of the Norfolk & Western Railroad Company, as the result of alleged negligence on the part of his fellow servant. The verdict and judgment were in his favor, and the company has appealed. In the record there are three bills of exception, upon which the questions to be considered arise. Two of these exceptions were reserved by the appellant, and one by the appellee.

It appears that in May, 1891, an extra train of loaded freight cars was started from Shenandoah, Va., about 11:30 P. M., to run through to Hagerstown, Md. The crew consisted of a conductor, an engineman, a fireman, a flagman, and two brakemen. Hoover, the appellee, was the engineman. As the train proceeded northward, it descended some heavy grades, and the engineman noticed that its speed was not kept under proper control by the brakemen. At Luray the train laid over for an hour, and the engineman requested the brakemen not to let him down the hills so rapidly, as the night was quite foggy. After leaving Luray, they ascended the grade to Vaughn's Summit, turning the point at a speed of about ten miles an hour. Immediately upon passing the summit the appellee shut off the steam, so that the train might descend by gravity alone, without aid from the engine. When about a train's length over the hill, he discovered that the train was increasing its speed, and he applied the tank brake; but, this producing no effect, he blew for brakes, turned on the driver brakes, and applied sand to the track. This not checking the train, he again blew for brakes, and reversed his engine. He repeated his signals for brakes at least once, and probably twice, afterwards, but they seem not to have been heeded by the brakemen, for the train moved rapidly onward down the grade. The packing blew out of the cylinder, and this caused the train to plunge forward, throwing the appellee back into the tender. At this juncture they were rapidly approaching, and were only some ten or twelve car lengths distant from, Possum

---

master was skillful. Hardy v. Carolina Cent. R. Co. 76 N. C. 5.

A brakeman injured by a low bridge may show that the other brakemen causing the injury were green and incompetent and known to be such by the company. Altee v. South Carolina R. Co. 21 S. C. 550.

Incompetency on the part of the conductor and engineer operating colliding trains with other evidence showing collision was caused by such incompetency and that the railroad company was aware of such incompetency, establishes liability. (Engineer was killed) Kansas Pac. R. Co. v. Salmon, 14 Kan. 512.

In Toledo, W. & W. R. Co. v. Durkin, 76 Ill. 395 Illinois Cent. R. Co. v. Cox, 21 Ill. 20, 71 Am. Dec. 208; Thayer v. St. Louis, A. & T. H. R. Co. 22 Ind. 26, 85 Am. Dec. 409; Brazil & C. Coal Co. v. Cain, 98 Ind. 282; Marquette & O. R. Co. v. Taft, 28 Mich. 289; Quincy Min. Co. v. Kitts, 42 Mich. 34; Fifield v. Northern Railroad, 42 N. H. 225; Willis v. Oregon R. & Nav. Co. 11 Or. 257; Hard v. Vermont & C. R. Co. 32 Vt. 473; Fox v. Sandford, 4 Sneed, 36, 67 Am. Dec. 587; Weger v. Pennsylvania R. Co. 55 Pa. 460; Brown v. Winona & St. P. R. Co. 27 Minn. 162, 38 Am. Rep. 285; O'Donnell v. Allegheny Valley R. Co. 59 Pa. 239, 98 Am. Dec. 336; Delaware & H. Canal Co. v. Carroll, 89 Pa. 374.—It was held that if a master has not used due diligence in the selection of competent servants he is liable for injuries caused by their acts to fellow servants by such incompetency; but this was not the question involved in these cases.

But a master is not liable to a servant for injuries caused by incompetency of a fellow servant, if the master has used reasonable care and diligence in selecting such servants causing the injury, and had no notice of his incompetency. (Baggageman claimed the bridge inspector was incompetent) Warner v. Erie R. Co. 39 N. Y. 468; (blacksmith was injured by act of striker) Melville v. Melville, Ft. S. & G. R. Co. 48 Fed. Rep. 839; (brakeman injured by act of engineer) Houston & T. C. R. Co. v. Willie, 53 Tex. 318, 37 Am. Rep. 756; (brakeman was injured in making flying switch) Pilkinton v. Gulf, C. & S. F. R. Co. 70 Tex. 226; (brakeman injured by act of engineer and conductor) Pittsburgh, Ft. W. & C. R. Co. v. Devinney, 17 Ohio St. 197; Summerhays v. Kansas Pac. R. Co. 2 Colo. 484; (brakeman injured by act of switchman) Ponton v. Wilmington & W. R. Co. 51 N. C. 245; (engineer injured by act of chief engineer on a steamer) Searle v. Lindsay, 11 C. B. N. S. 422, 31 L. J. C. P. 106, 8 Jur. N. S. 746, 5 L. T. N. S. 427, 10 Week. Rep. 89; (brakeman injured by defective ladder through act of car inspector) Mackin v. Boston & A. Railroad, 135 Mass. 201, 46 Am. Rep. 455; (bricklayer injured by defective scaffold through act of foreman) Wigmore v. Jay, 5 Exch. 354, 19 L. J. Exch. 296, 14 Jur. 857; (engineer injured by act of telegraph operator throwing switch under sudden impulse) Burke v. Syracuse, B. & N. Y. R. Co. 69 Hun, 21; (fireman killed through act of telegraph operator and conductor) Slater v. Jewett, 85 N. Y. 73, 39 Am. Rep. 627; (fireman injured at a washout through act of chief engineer and superintendent) Mobile & M. R. Co. v. Smith, 59 Ala. 245; (foundry helper injured by truck-wagon driver) Hogan v. Central Pac. R. Co. 49 Cal. 129; (laborer at blast furnace injured by act of laborer) Holland v. Tennessee Coal, Iron & R. Co. 12 L. R. A. 232, 91 Ala. 444; (laborer injured by act of engineer) Louisville & N. R. Co. v. Collins, 2 Duv. 114, 87 Am. Dec. 486; (Laborer at mines injured through act of engineer) Barton's Hill Coal Co. v. Reid, 3 Macq. H. L. Cas. 266, 4 Jur. N. S. 767; (laborer at mines injured by act of mining boss) Reese v. Biddle, 112 Pa. 72; McLean v. Blue Point Gravel Min. Co. 51 Cal. 255; (laborer on tramway injured through act of track layer) Gallagher v. Piper, 16 C. B. N. S. 669, 33 L. J. C. P. 329; (laborer injured by failure to place signal) Moran v. New York Cent. & H. R. R. Co. 3 Thomp. & C. 770; (laborer on cars injured) Hutchinson v. New York, N. & B. R. Co. 5 Exch. 352, 19 L. J. Exch. 296, 14 Jur. 837; (laborer at rolling mill injured by act of engineer) Caldwell v. Brown, 53 Pa. 453; (laborer in building injured by act of superintendent in construction) Brown v. Accrington Cotton Spinning & Mfg. Co. 3 Hurlst. & C. 511, 34 L. J. Exch. 208, 13 L. T. N. S. 94; (laborer injured by act of foreman in locomotive shops) Beaulieu v. Portland Co. 48 Me. 291; (laborer on train injured by act of foreman and engineer) O'Connell v. Baltimore & O. R. Co. 20 Md. 212, 83 Am. Dec. 549; (laborer injured by foreman of hoisting tackle) McDermott v. Boston, 133 Mass. 349; (laborer on train injured by act of engineer) Chicago & A. R. Co. v. Keefe, 47 Ill. 108; (mason injured through defective platform) Colton v. Richards, 123 Mass. 484; (painter injured by act of foreman with hoisting engine) Feltham v. Eng-

Hollow, which is crossed upon a trestle 75 or 80 feet high. The appellee saw that a collision with another freight train standing, or moving very slowly northward, on the trestle, was imminent and unavoidable, and, to save himself, jumped from his engine, and received the injuries for which he has brought the pending suit. There was evidence offered tending to prove that Huyett, one of the brakemen, had been drinking that night before the accident happened; and, within thirty minutes prior to the collision, his breath gave unmistakable evidence of it. In this state of the proof, a witness was asked whether he knew the general reputation of Huyett and Reese, the two brakemen, for sobriety for one or two years before the accident and following that, and, if so, to state what that reputation was. To this question and the evidence sought to be elicited thereby, the appellant objected, but the court permitted the question to be asked and answered, and this ruling forms the subject of the first exception.

It has been repeatedly held by this court, and is the settled and established doctrine of Maryland, that in actions of this character, where a servant sues his master for injuries resulting from the negligence of a fellow servant, the plaintiff, to succeed, must prove not only that some negligence of the fellow servant caused the injury, but also that the master had himself been guilty of negligence, either in the selection of the negligent fellow servant in the first instance, or in retaining him in his service afterwards. Mere negligence on the part of a fellow servant, though resulting in injury, will not suffice to support the action, because the master does not insure one employé against the carelessness of another; but he owes to each of his servants the duty of using reasonable care and caution in the selection of competent fellow servants, and in the retention in his service of none but those who are. If he does not perform this duty, and an injury is occasioned by the negligence of an incompetent or careless servant, the master is responsible to the injured employé, not for the mere negligent act or omission of the incom-

land, L. R. 2 Q. B. 33; (painter injured by scaffold in building) Tarrant v. Webb, 18 C. B. 797, 25 L. J. C. P. 261; (snow shoveler injured by track-walker handling switch) Fagundes v. Central Pac. R. Co. 8 L. R. A. 814, 79 Cal. 97; (switch conductor injured by act of engineer) Columbus, C. & I. Cent. R. Co. v. Troesch, 68 Ill. 545, 18 Am. Rep. 573; (switchman injured by act of engineer) Satterly v. Morgan, 35 La. Ann. 1166; (section hand injured by act of car inspector) Indiana, I. & I. R. Co. v. Snyder (Ind.) 53 Am. & Eng. R. R. Cas. 225; (yardman injured by act of engineer) O'Hare v. Chicago & A. R. Co. 95 Mo. 662.

And where a train manager was experienced and had notice that the conductor was sick or unfit and was compelled to make the run, and the engineer was injured, the master is not liable. Michigan Cent. R. Co. v. Dolan, 32 Mich. 510.

And that an inspector had worked three or four months putting in brasses and then in the carpentry repair shop for one or two years, does not establish his incompetency. Gibson v. Northern Cent. R. Co. 22 Hun, 289.

The fact that a person is near sighted does not necessarily render him incompetent to be engineer of a locomotive, if he can see with glasses. (Car repairer killed) Texas & P. R. Co. v. Harrington, 62 Tex. 597.

And that a yard-master, was incompetent, partially paralyzed, sluggish, and forgetful, is not sufficient unless the company had notice of that fact or ought to have known it, where an engineer was killed. East Tennessee, V. & G. R. Co. v. Gurley, 12 Lea, 46.

And under Pennsylvania Act of 1885 (Pub. Laws, 217, §§ 15, 17), rendering mining company liable for employing mining boss who has no certificate of competency, the injury must be occasioned by willful failure to comply with the act, and it must be shown that the injury was occasioned by violation of the act. That is, there may be no liability although the boss had no certificate. Christner v. Cumberland & E. L. Coal Co. 146 Pa. 67.

In Wright v. New York Cent. R. Co. 25 N. Y. 562, it was held that where an engineer negligently and recklessly disregarded directions of master and ran ahead of time at great speed the company is not liable where the injury was not the result of ignorance or incompetency but of rashness and recklessness.

The question of competency must relate to the time of injury. (Fireman injured by switchman) Harvey v. New York Cent. & H. R. R. Co. 83 N. Y. 451.

And in Johnston v. Pittsburgh & W. R. Co., 114 Pa. 443, it was held that where a brakeman was injured through the negligence of the conductor and engineer, and it was claimed that the conductor was sick and unfit and the engineer had been on continuous duty so that he was unfit, there is no liability where it is not shown that the cause of the injury was occasioned through these reasons.

So there is no negligence shown in employing the engineer where the master mechanic employing him had reason to think he had served as fireman the usual period and some time as engineer, and no fault had been found. (Brakeman injured) Texas & N. O. R. Co. v. Berry, 67 Tex. 238.

And if a foreman acting as engineer handles cars and engines as carefully as any engineer of ordinary care could have done under the circumstances, a railroad company is not liable even if he was otherwise incompetent. (Engine oiler injured) Gulf, C. & S. F. R. Co. v. Schwabbe, 1 Tex. Civ. App. 573.

In Parrish v. Pensacola & A. R. Co., 28 Fla. 251, it was held that where the plaintiff was on a gravel train and claimed that the fireman was inexperienced, incompetent, and unfit to act as fireman or engineer, but the declaration and proofs showed that the fireman was competent for fireman and the engineer was competent for engineer, there is no incompetency shown, although the engineer turned the engine over to the fireman. The turning of the engine over by the engineer was without knowledge or consent of any of the agents of defendant.

In Houston & T. C. R. Co. v. Myers, 55 Tex. 110, it was held that admitting that it was negligence for the engineer to trust the engine to the fireman and negligence for the fireman to operate it, still the engineer was competent and the fireman was competent for their purposes, and for this isolated act of negligence there can be no recovery, where a brakeman was injured in coupling.

And for a brakeman to recover for injuries caused by engineer, charging incompetency of fireman temporarily in charge, it must be established that the company did not exercise ordinary care in allowing him to run the engine, that he was so inexperienced as not to be fit for the position, that he mismanaged it and that the mismanagement caused the injury. Core v. Ohio River R. Co. 33 W. Va. 456.

petent or careless servant, but for his own negligence in not discharging his own duty towards the injured servant. As this negligence of the master must be proved, it may be proved like any other fact,—either by direct evidence, or by the proof of circumstances from which its existence may, as a conclusion of fact, be fairly and reasonably inferred. That drunkenness on the part of a railroad employé renders him an incompetent servant will scarcely be disputed; nor can it be questioned that a master who knowingly employs such a servant, or who, knowing his habits, retains him in his service, would be guilty of a reckless and wanton breach of duty, not only to the public, but to every employé in his service. There is no evidence in the record, nor has there been a suggestion, that either the conductor, fireman, or flagman of the train was negligent or incompetent. The negligence which directly caused the accident is attributed solely to the brakemen; and the appellant's negligence, which, as it is claimed, fixes its liability, lies in its employment of, or continuing to retain in its service, these dissipated or intemperate brakemen. But, as we have stated, it was necessary for the plaintiff to show, not only their employment, but that the company had not used due and ordinary care in selecting them. There was no direct evidence adduced to show the absence of such care; but the question excepted to, and the evidence elicited in response to it, were designed to show by indirect or circumstantial evidence that the company had not used the degree of care and caution in the selection of these brakemen that its duty imperatively required it to use. So the question is, Can you fix upon the master a failure to use due care in selecting careful servants by showing such notorious or general reputation respecting the servant's unfitness or incompetency as that the master could not, without negligence on his part, have been ignorant of it when he employed the servant? About this there ought to be no difficulty. If the servant's general reputation before employment is so notorious as to unfitness as that it must have been known to the master but for his

---

But in Norfolk & W. R. Co. v. Thomas (Va.) July 20, 1893, it was held that a railroad did not perform its duty in furnishing a competent engineer where the engineer in charge turned over his engine to an inexperienced fireman who had only been in service three or four weeks and never on a railroad before and the conductor knew he was running the engine.

Although Mo. Gen. Stat. 1865, chap. 63, provides for liability of a corporation to any person for failure to ring a bell, no recovery can be had by an employé if the person causing the injury was competent, as this statute does not change the common law. Rohback v. Pacific Railroad, 43 Mo. 187.

Similar doctrine is applied to Maine Rev. Stat., chap. 81. Carle v. Bangor & P. Canal & R. Co. 43 Me. 269.

And under Code of Napoleon, 1382, providing that every act that causes damages subjects him by whose failure it happened to repair it, does not apply to injuries by one servant to another unless it was shown that such servant was unskillful or habitually careless. Hubgh v. New Orleans & C. R. Co. 6 La. Ann. 496, 54 Am. Dec. 565.

And in Florida, prior to 1887, a railroad was not responsible to a brakeman for injury caused by a fellow servant unless he was unskillful, and a railroad furnishing a surgeon of ordinary competency and skill is not liable. South Florida R. Co. v. Price, 32 Fla. 46.

Under California Code, section 1970, providing for liability for injuries to persons employed through negligence of other employé, it must be shown that the master was negligent in the selection of the servant. McDonald v. Hazeltine, 53 Cal. 35; Stephens v. Doe, 73 Cal. 28; Congrave v. Southern Pac. R. Co. 88 Cal. 360.

Under the seventh section of Illinois Act for Health and Safety of Miners, the master is liable for injuries to employés caused by the engineer if the engineer is incompetent or under eighteen years of age. Niantic Coal & Min. Co. v. Leonard, 126 Ill. 218.

And it was said in Cowles v. Richmond & D. R. Co., 84 N. C. 309, 37 Am. Rep. 620; Anderson v. New Jersey S. R. Co. 7 Robt. 611; Treadwell v. New York, 1 Daly, 123; Harrison v. Central R. Co. 31 N. J. L. 293; William Bros. v. Carter, 52 Mo. 373; Gibson v. Pacific R. Co. 46 Mo. 163, 2 Am. Rep. 497; Howd v. Mississippi Cent. R. Co. 50 Miss. 178; Wonder v. Baltimore & O. R. Co. 32 Md. 411, 3 Am. Rep. 143; Atchison, T. & S. F. R. Co. v. Moore, 20 Kan. 632; Benn v. Null, 65 Iowa, 407; Little Rock & Ft. S. R. Co. v. Duffey, 35 Ark. 602; Chicago & N. W. R. Co. v. Swett, 45 Ill. 197, 92 Am. Dec. 206; Sherman v. Rochester & S. R. Co. 17 N. Y. 153; Mad River & L. E. R. Co. v. Barber, 5 Ohio St. 541, 67 Am. Dec. 312; Wiggett v. Fox, 36 Eng. L. & Eq. 486; Wilson v. Merry, L. R. 1 H. L. Sc. App. 326, 19 L. T. N. S. 30; Consolidated Coal & Min. Co. v. Floyd, *post*, 848, 51 Ohio St. — that a master who uses due diligence in the selection of competent servants is not liable to other fellow servants injured by their acts arising from such incompetency; but this was not the question in the cases.

2. Retention in employ.

A master retaining in his employ incompetent servants after knowledge or notice of such incompetency is liable to fellow servants for injuries occasioned thereby. (Brakeman injured by switchman) Coppins v. New York Cent. & H. R. R. Co. 122 N. Y. 563; (brakeman injured by act of engineer) Union Pac. R. Co. v. Young, 19 Kan. 488; (brakeman injured by act of conductor) Nellon v. Kansas City, St. J. & C. B. R. Co. 85 Mo. 599; (carpenter injured by act of superintendent) Mentzer v. Armour, 18 Fed. Rep. 373; (deck hand injured by act of steamboat engineer. Failure to test boiler) Walker v. Bolling, 22 Ala. 294; (engineer injured by failure of section boss and road-master) New Orleans, J. & G. N. R. Co. v. Hughes, 49 Miss. 258; (fireman injured by act of switchman) Galveston, H. & S. A. R. Co. v. Faber, 77 Tex. 153; (laborer injured by fireman acting as engineer) Ohio & M. R. Co. v. Collarn, 73 Ind. 261, 38 Am. Rep. 134; (laborer injured by foreman of pile-driver) Hatt v. Nay, 144 Mass. 186.

But a railroad has a reasonable time in which to discharge an engineer after knowledge of his inefficiency. Lake Shore & M. S. R. Co. v. Stupak, 123 Ind. 210.

The negligence of a company in retaining an incompetent fireman after knowledge of incompetency whereby a switchman was injured, is a question for the jury. Catlin v. Michigan Cent. R. Co. 66 Mich. 356.

But a railroad company is not liable for injury to a watchman through an incompetent engineer causing injury in coupling cars, unless he was continued after knowledge of his incompetency. Union Pac. R. Co. v. Milliken, 8 Kan. 647.

(the master's) negligence in not informing himself,—if he could have been ignorant of it only because he failed to make investigation,—then it is obvious that he had not used the care and caution which the law demands of him in selecting his employés. Hence "the servant's general reputation for unfitness may be sufficient to overcome the presumption that the master used due care in his selection, even though actual knowledge of such reputation for unfitness on the master's part is not shown." Wood, Mast. & S. § 420.

In *Davis* v. *Detroit & M. R. Co.*, 20 Mich. 112, 4 Am. Rep. 364, Cooley, J., speaking for the court, adopts the case of *Gilman* v. *Eastern R. Co.* 13 Allen, 433, 90 Am. Dec. 210, which puts upon the employer the responsibility of negligently employing an unfit person, generally known and reputed to be such, notwithstanding the employer may in fact have been ignorant of such unfitness. Continuing, he said: "The ignorance itself is negligence in a case in which any proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative." So, in *Hills* v. *Chicago & G. T. R. Co.*, 55 Mich. 437, where a track hand was killed by an engine backing rapidly along a switch, and the engineman was drunk, the court said: "When, however, as in this case, it is shown that the accident occurred through the negligent act of the servant, who was in an intoxicated condition, and when it is shown, further, that he was in the habit of drinking intoxicating liquors to excess, and such habit had extended over a period of nine months while in defendant's employ, and no actual knowledge or notice ever reached any superior officer of the engineer, we think the jury may be justified in concluding from such evidence that the defendant was negligent in failing to learn such habit, and in retaining the engineer in its employment." See also, *Gilman* v. *Eastern R. Co.* 90 Am. Dec. 210, 13 Allen, 433; *Wright* v. *New York Cent. R. Co.* 25 N. Y. 566; *Chicago & A. R. Co.* v. *Sullivan*, 63 Ill. 293; *Chapman* v. *Erie R. Co.* 55 N. Y. 579. The evidence offered and admitted had no relation to specific or isolated

---

3. *Incompetency through use of liquor.*

The master is liable for injuries to a servant caused by incompetency of fellow servants where such master has not used due care in selecting or retaining in his employ the servant causing such injury; and habits of intoxication by servants in charge of dangerous machinery, rendering them careless or reckless, is equivalent to incompetency, and where a master has actual notice that the servant operating dangerous machinery and occasioning the injury was addicted to the use of intoxicating liquor, he is liable for employing or retaining him after such notice, if injury is occasioned thereby. As where an engineer was injured and the officers had knowledge of the yard-master's habits in the use of liquor. Michigan Cent. R. Co. v. Gilbert, 46 Mich. 176.

And where a brakeman was injured by the conductor. Galveston, H. & S. A. R. Co. v. Davis, 4 Tex. Civ. App. 468.

So where a workman was injured and the company had notice of the habits of the foreman of mills. Kean v. Detroit Copper & Brass Rolling Mills, 66 Mich. 277.

And where a brakeman was injured and the company had notice of the habits of the conductor. Nellon v. Kansas City, St. J. & C. B. R. Co. 85 Mo. 589.

So where a laborer at a quarry was injured and the company had notice of the habits of the foreman. Maxwell v. Hannibal & St. J. R. Co. 85 Mo. 95.

So where a brakeman was injured and the roundhouse foreman had notice of the engineer's habits. Williams v. Missouri Pac. R. Co. 109 Mo. 475.

So where a workman on a scaffold was injured and the general agent of the railroad company for hiring foreman had notice of the foreman's habits. Laning v. New York Cent. R. Co. 49 N. Y. 521, 10 Am. Rep. 417.

And the same was held where an engineer was injured and the railroad superintendent had notice of the habit of the conductor causing the injury. Huntingdon & B. T. R. & Coal Co. v. Decker, 84 Pa. 419.

So where an engineer was killed and the company had notice of the habits of an assistant under Louisiana Code, article 2320, providing master is liable for damages by servants which he might prevent. Poirier v. Carroll, 35 La. Ann. 699.

But a mining law of Pennsylvania of 1885, requiring that an engineer employed be a sober and competent person, is satisfied if the employer believes him to be sober and competent. Mulhern v. Lehigh Valley Coal Co. 161 Pa. 270.

If the company is negligent in failing to ascertain the habits as to drinking of such employé which might have been known by reasonable inquiry and were the direct cause of the injury to coemployé, the company is liable. (Brakeman injured by brakeman: Zumwalt v. Chicago & A. R. Co. 35 Mo. App. 661; (laborer injured by railroad engineer) Hills v. Chicago & G. T. R. Co. 55 Mich. 443; (car coupler injured by switchman) Gilman v. Eastern R. Co. 13 Allen, 433, 90 Am. Dec. 210; (brakeman killed by act of engineer) Illinois Cent. R. Co. v. Jewell, 46 Ill. 99, 92 Am. Dec. 240; (brakeman killed through act of man in charge of train) Chicago & A. R. Co. v. Sullivan, 63 Ill. 293; (employé on engine injured by engineer on another) Lyons v. New York Cent. & H. R. R. Co. 32 Hun, 353; (mail agent injured by act of conductor) Pennsylvania R. C. v. Books, 57 Pa. 343, 98 Am. Dec. 229; (oiler injured by act of engineer) Stevens v. San Francisco & N. P. R. Co. 100 Cal. 554.

These cases *supra* fully sustain the doctrine announced in NORFOLK & WESTERN R. Co. v. HOOVER.

But to render the master liable it must be shown that the injury was caused by such habits of intoxication where incompetency is alleged to have been from the use of liquor. (Laborer injured by engineer of stevedore company) Cosgrove v. Pitman (Cal.) June 28, 1894; (firemen killed by act of railroad engineer) Engelhardt v. Delaware, L. & W. R. Co. 73 Hun, 588; (laborer injured by act of derrick engineer) Probst v. Delameter, 100 N. Y. 266; (firemen injured by act of conductor) Crew v. St. Louis, K. & N. W. R. Co. 20 Fed. Rep. 87; Campbell v. Wing, 5 Tex. Civ. App. 431; (laborer injured by act of section foreman) Harrington v. New York Cent. & H. R. R. Co. 19 N. Y. S. R. 20; (engineer killed by act of conductor) Bonner v. Whitcomb, 80 Tex. 178.

The question of negligence is one for the jury where a foundry fireman had intemperate habits known to the superintendent, and by reason thereof a workman was injured. Campbell v. Roediger (Md.) March 13, 1894.

And the same was held where a railroad employed a boss carpenter who had habits of intemperance and a carpenter was injured through defective

acts of negligence. These, unless brought home to the knowledge of the master, would not have been admissible as reflecting on the question of the master's care. *Baltimore Elevator Co.* v. *Neal*, 65 Md. 438. We think, for the reasons we have given and upon the authorities we have cited, there was no error committed in allowing the question excepted to in the first bill of exceptions to be put and answered.

Under the ruling, quite a number of witnesses testified to Huyett's general reputation for intemperance, extending from a period long anterior to his employment by the appellant, up to and after the accident. One witness, Eyler, gave evidence as to Reese's general reputation. With respect to Huyett, the evidence, if credited by the jury, showed a general reputation, covering many years, uninterruptedly, and of such a notorious character that a jury might well have inferred it was known to the master when Huyett was employed, or else that the master failed to know it only because of neglecting to make proper inquiry. There was consequently evidence legally sufficient to go to the jury upon the subject of the company's negligence; and therefore there was no error in rejecting the appellant's first and fifth prayers, which sought to take the case from the consideration of the jury, nor in rejecting its fourth prayer, which sought to exclude this evidence from the case.

There was error in rejecting the second prayer of the appellant. It asked the court to say to the jury that, if the injury to the plaintiff was caused by the intoxication or negligence of the brakemen, or either of them; that the brakemen were employed by Shull, the train dispatcher, and were sent out by him on the train in question; and, further, that Shull was guilty of negligence in sending out these brakemen, or either of them, on the train,—"yet the jury are further instructed that Shull and the plaintiff were coemployés of the defendant in the sending out of said brakemen, and the defendant is not responsible to the plaintiff for the neglect or want of care of the said Shull, unless they shall further find that there was

---

scaffold. Brickner v. New York Cent. R. Co. 2 Lans. 515.

And in Gilman v. Eastern R. Corp., 10 Allen, 233, 87 Am. Dec. 635, it was held that, if a railroad company knowingly or in ignorance caused by its own negligence employed an habitual drunkard as switchman and thereby occasioned an accident, it is liable to a car repairer.

In Sizer v. Syracuse, B. & N. Y. R. Co. 7 Lans. 67, it was said that a railroad company owes to a car repairer the highest care to select a temperate engineer, and would be liable for knowingly employing others causing the injury, but that was not the question involved.

But in Chapman v. Erie R. Co., 55 N. Y. 579, where an engineer was killed in a collision through the negligence of a telegraph operator and train dispatcher, competent when employed, but given to intoxication thereafter, it was held that good character and proper qualifications once possessed would be presumed to continue.

4. Pleading incompetency.

A complaint is sufficient charging death of the baggagemaster through the act of the conductor alleging that he was not a careful, skillful, and attentive conductor for a passenger train, which was known to defendant, and that the death of plaintiff's intestate was caused by such conductor's negligence. Kerlin v. Chicago, P. & St. L. R. Co. 50 Fed. Rep. 185.

A petition by a laborer for a rope company alleging employment of a fellow servant was done in a careless and negligent manner and that in consequence thereof an incompetent servant was taken into the company's service who caused the injury by his incompetency, is a sufficient allegation of the negligence of employment. Galveston Rope & Twine Co. v. Burkett, 2 Tex. Civ. App. 308.

Complaint by a yard switchman charging incompetency of the fireman through failure to understand signals, and alleging his inexperience is sufficient as to the allegation of his incompetency. Galveston, H. & S. A. R. Co. v. Eckels (Tex.) May 16, 1894.

But failure by a brakeman injured by a defective bridge to allege employment of incompetent servants or failure to exercise ordinary care in their selection is insufficient. McDermott v. Pacific R. R. Co. 30 Mo. 115.

A petition by a brakeman charging negligence and unskillfulness of the conductor causing the injury, is insufficient unless it alleges that the company was negligent in employing or retaining. Dow v. Kansas Pac. R. Co. 8 Kan. 642.

And a complaint by an employé not alleging want of ordinary care and prudence in the employment of coemployé causing the injury, or retention after notice of inefficiency, and that the injury was caused by such incompetency, is insufficient. (Brakeman injured by engineer) Indiana, B. & W. R. Co. v. Dailey, 110 Ind. 75; (laborer injured by act of roadmaster) Lawler v. Androscoggin R. Co. 62 Me. 467, 16 Am. Rep. 432; (laborer injured by employé) Elwell v. Hacker (Me.) May 17, 1894; (mining laborer injured by engineer) Collier v. Steinhart, 51 Cal. 119; (laborer in factory injured by straw feeder) Boyce v. Fitzpatrick, 80 Ind. 527; (switchman injured by act of section boss) Slattery v. Toledo & W. R. Co. 23 Ind. 81; (teamster injured by blast) Bogard v. Louisville, E. & St. L. R. Co. 100 Ind. 491; (track repairer injured by act of engineer) Lake Shore & M. S. R. Co. v. Stupak, 108 Ind. 1.

A petition alleging that the receiver and engineer in charge had put an unskillful engineer on a locomotive does not state a cause of action if it fails to allege that the receiver negligently and knowingly employed an unskillful and incompetent engineer, as he might have had good reason for believing he was competent. Jordan v. Wells, 3 Woods, C. C. 527.

And a complaint failing to allege that the act of the fireman caused the injury and that he was incompetent, was insufficient, where a brakeman was injured. Kersey v. Kansas City, St. J. & C. B. R. Co. 79 Mo. 362.

And an allegation by an employé that it was the railroad's duty to employ careful and skillful servants but that it failed to select those that were competent, is insufficient, as it should have charged want of care and diligence in the selection. Moss v. Pacific Railroad, 49 Mo. 167, 8 Am. Rep. 126.

And a complaint not alleging that the officer causing injury was incompetent, is insufficient. Albro v. Agawam Canal Co. 6 Cush. 75.

But a plea that the company had exercised ordinary care and diligence to secure a skillful engineer who was reputed to be careful and skillful and supposed to be such at the time of the collision is not good, as supposed means no more than believed. Alabama & F. R. Co. v. Waller, 43 Ala. 459.

negligence on the part of the defendant in the employment of Shull; and there is no legally sufficient evidence in the cause from which the jury can so find." Now, whether Shull was a deputy master, or vice-principal, or only a fellow servant of the plaintiff, is a question of law to be determined by the court, if the facts be undisputed or conceded. *Yates* v. *McCullough Iron Co.* 69 Md. 382. Shull was a mere dispatcher of trains, with power to employ and discharge flagmen and brakemen, and having general charge of the trainmen of the first division of the road, and the movement of trains thereon. He was employed by the division superintendent, who had the general management of the division. The enginemen and firemen are also under the instructions of the division superintendent. This is all the evidence (and it is entirely undisputed) to show that Shull was a vice-principal, and not a fellow servant. In *Wonder's Case*, 33 Md. 418, 3 Am. Rep. 143, the general rule was laid down that all who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it, are fellow servants, each taking the risk of the other's negligence.

A complaint by an engine cleaner injured by the act of the engineer was sufficient as regards the allegation of incompetency of the engineer and negligence of the company in employing and retaining him; but was not sufficient for other reasons. Spencer v. Ohio & M. R. Co. 130 Ind. 181.

5. *Evidence.*

a. *Generally.*

If there is no evidence of personal negligence of the master in failing to ascertain fitness in hiring a servant, there can be no recovery for that cause. Ormond v. Holland, El. Bl. & El. 102; Wiggins Ferry Co. v. Blakeman, 54 Ill. 201.

And the mere fact of hiring a boy twelve years old to operate an elevator is not of itself want of ordinary care. Smillie v. St. Bernard Dollar Store, 47 Mo. App. 402.

Raising a car coupler to the place of conductor in a yard is not of itself evidence of negligence where his experience in inferior positions was such as to fit him for the higher. (Car coupler killed) Haskin v. New York Cent. & H. R. R. Co. 65 Barb. 129.

And a single act of incompetency together with the engineer testifying before the jury is not sufficient to justify the conclusion on his appearance and this act that his incompetency was known to the company where there was nothing in his appearance to indicate his incompetency. Peaslee v. Fitchburg R. Co. 152 Mass. 155. This case distinguishes Keith v. New Haven & N. Co., *infra*, but also seems to overrule it.

In Keith v. New Haven & N. Co., 140 Mass. 175, the jury were permitted to consider the appearance of the car inspector who was called as a witness, where a brakeman was injured, to aid them in determining whether he was of suitable qualification and sufficiently intelligent.

In Corson v. Maine Cent. R. Co., 76 Me. 244, it was held that where a brakeman was injured by incompetency of an engineer he cannot show negligence in employment by looks and manners of engineer while testifying as a witness.

In Summersell v. Fish, 117 Mass. 312, the court sustained an objection to argument as to negligence in selecting foreman when there was no evidence in the case on that question except the injury in raising the derrick. The negligence in employing was not pleaded.

b. *Specific acts.*

Knowledge of one act of incompetency or recklessness is not sufficient to impose liability. (Road master injured by act of engineer) Holland v. Southern Pacific Co. 100 Cal. 240; (brakeman injured by act of engineer and brakeman) Ohio & M. R. Co. v. Dunn (Ind.) March 7, 1894; (laborer on lock injured by act of laborer) Lee v. Detroit Bridge & Iron Works, 62 Mo. 565; (laborer injured in shaft by act of engineer) Baltimore v. War, 77 Md. 593.

In Frazier v. Pennsylvania R. Co., 38 Pa. 104, 80 Am. Dec. 467, it was held that where a brakeman was injured by negligence of conductor the fact that the conductor had caused several collisions by carelessness for which he had been fined by the company, is inadmissible to establish his incompetency, as special acts do not establish reputation.

So specific acts of carelessness or unskilfulness do not establish negligence on the part of the master in employing or retaining such servant. (Laborer injured by act of captain of tug) Baltimore Elevator Co. v. Neal, 65 Md. 438; (employé injured by act of engineer) Huffman v. Chicago, R. I. & P. R. Co. 78 Mo. 50; (fireman killed through act of switchman) Baulec v. New York & H. R. Co. 59 N. Y. 356, 17 Am. Rep. 325. See also Peaslee v. Fitchburg R. Co. *supra*.

So incompetency is not shown by the act causing the injury. (Employé at factory injured by act of operator) Curran v. Merchants Mfg. Co. 130 Mass. 374, 39 Am. Rep. 457; (laborer injured by act of foreman in stone quarry) Salem Stone & Lime Co. v. Chastain (Ind.) March 15, 1894; (laborer on railroad injured by act of co-laborer) Lindvall v. Woods, 44 Fed. Rep. 855; (brakeman injured by act of engineer) Texas & N. O. R. Co. v. Berry, 67 Tex. 238.

But in Potts v. Port Carlisle Dock & R. Co., 2 L. T. N. S. 283, 8 Week. Rep. 524, where a brakeman was injured by faulty construction of turn-table, it was held that if the work could be shown to be grossly bad it might not be necessary to call evidence of negligence in faulty construction, but where it has stood the test for four years there is no case.

Evidence of specific acts is admissible to show notice to the company. (Brakeman injured by act of conductor) Pittsburgh, Ft. W. & C. R. Co. v. Ruby, 38 Ind. 294, 10 Am. Rep. 111.

And in Couch v. Watson Coal Co., 46 Iowa, 17, the same was said, but was not admissible in that case because such acts were not shown to be prior to the accident. (Miner injured by act of engineer.) (Bridge carpenter injured by act of another carpenter) Craig v. Chicago & A. R. Co. 54 Mo. App. 523.

And evidence of subsequent acts of engineer not showing the incompetency complained of is not sufficient. Ransier v. Minneapolis & St. L. R. Co. 32 Minn. 331.

c. *Notice to company.*

Evidence of reports to conductor of carelessness on the part of the engineer and that the engine had frequently come into the shop in bad condition, was sufficient to make question for the jury where a brakeman was injured through act of engineer. Houston & T. C. R. Co. v. Patton (Tex.) June 30, 1888.

And after notice of incompetency of conductor the railroad continues him at their own risk, where an engineer was injured. Ross v. Chicago, M. & St. P. R. Co. 2 McCrary, 235.

And knowledge of infirmity of brakeman, habit

In that case, a brakeman, who was injured while using a defective brake, was held to be a fellow servant with the mechanics in the shops, the inspector of machinery and rolling stock, and the superintendent of the movement of trains. And so in *State* v. *Malster*, 57 Md. 287, it was held that a superintendent or manager is a fellow servant, within the rule which exonerates the master. In *Baltimore Elevator Co.* v. *Neal*, 65 Md. 438, the captain of a steam tug owned by the company was held to be a fellow servant of a laborer who was injured in the company's service. This court said in that case: "Nor is the liability of the master enlarged or made different by the fact that the servant who has suffered the injury occupied a grade in the common service inferior to that of the servant whose misconduct caused the injury complained of." And in *Yates* v. *McCullough Iron Co.*, 69 Md. 370, the authorities were all reviewed, and it was held that the chief manager of the carbon works, who hired and discharged the hands, kept their time, etc., was only a fellow servant of a laborer who was injured while operating the machinery. *Baltimore* v. *War*, 77 Md. 593. In the face of these decisions, it is impossible to treat Shull as anything more than a fellow servant. The management of the division upon which he was train dispatcher was not committed to him. He was a subordinate, ap-

---

of going to sleep and failing to throw switch, is binding on the company. (Conductor injured) Gulf, C. & S. F. R. Co. v. Pierce (Tex.) June 14, 1894.

Notice to general superintendent of incompetency of engineer is notice to the company. (Road-master injured) Missouri Pac. R. Co. v. Patton (Tex. Civ. App.) 25 S. W. Rep. 339 (Tex. Sup.) 26 S. W. Rep. 978.

And a protest against the appointment of an engineer and discharge by the superintendent for causing a wreck, justifies finding that he was unfit. Mexican Nat. R. Co. v. Muesette, 24 L. R. A. 642, 86 Tex. 708.

And the knowledge by a road-master of the incompetency of a foreman is notice to the company. (Track repairer injured) McDermott v. Hannibal & St. J. R. Co. 73 Mo. 516, 39 Am. Rep. 526; McDermott v. Hannibal & St. J. R. Co. 87 Mo. 285.

But in Reiser v. Pennsylvania Co., 152 Pa. 38, it was held that notice to the chief train dispatcher and telegraph operator that the station agent acting as telegraph operator was incompetent, whereby the fireman was killed, is not notice to the company, as the train dispatcher did not employ or discharge such servants.

The promise of a yard-master that a fireman should not run the engine is binding on the company. (Switchman injured) Lyttle v. Chicago & W. M. R. Co. 84 Mich. 239.

And the master promising a blacksmith to discharge his helper is sufficient notice. Lyberg v. Northern Pac. R. Co. 39 Minn. 15.

So a promise by the general superintendent to discharge for inefficiency the engineer is notice where a car coupler was injured. Sutton v. New York, L. E. & W. R. Co. 50 N. Y. S. R. 514.

Where a company ought to have known of the habits of a switchman by the exercise of reasonable diligence, the question of liability is one for the jury where a brakeman was killed. Cameron v. New York Cent. & H. R. R. Co. 77 Hun, 519.

And evidence showing that the company ought to have known of the incompetency of the foreman is sufficient, where a track repairer was injured. Chicago, R. I. & P. R. Co. v. Doyle, 15 Kan. 58.

A bricklayer in a sewer injured by a barrow full of brick may show general reputation of infirmity in sight and hearing and strength of man in charge of barrow. Monahan v. Worcester, 150 Mass. 439.

But the fact that some workmen had remarked that the engineer had a careless reputation where there is no notice to the company of habitual carelessness, does not show want of care in his employment. Davis v. Detroit R. Co. 20 Mich. 105.

A reputation of incompetency as yard-master is not sufficient when based only on the fact that he had had no experience as switchman. (A laborer was injured) Lee v. Michigan Cent. R. Co. 87 Mich. 574.

See also subhead, *Habits of Intoxication*.

Where an injury was caused to an employé by the incompetency, recklessness, and unskillfulness of a captain of a tug, and the master by the exercise of reasonable care could have easily learned that the reputation of such captain for want of skill and recklessness was bad, it is wholly immaterial whether he knew it or not. Western Stone Co. v. Whalen, 151 Ill. 472.

d. *Burden of proof*

The burden of proof is on the party injured to establish the fact that the master did not use due care in the selection of the employé causing injury. (Conductor injured by act of engineer) Roblin v. Kansas City, St. J. & C. B. R. Co. 119 Mo. 476; (switchman injured by act of engineer) Stafford v. Chicago, B. & Q. R. Co. 114 Ill. 244; (employé injured by man in charge of machinery) Southern Cotton-Oil Co. v. De Vond (Tex.) Feb. 1, 1894.

The same was said in Chicago & E. I. R. Co. v. Geary, 110 Ill. 383, but was not the question involved. (Flagman injured by act of foreman.)

But if unfitness of engineer is shown to have existed at the time of employment the burden is then on the master to disprove negligence in employing him, where brakeman was injured. Crandall v. McIlrath, 24 Minn. 127.

And incompetency of brakeman cannot be inferred from the fact that he was colored. Missouri Pac. R. Co. v. Christman, 65 Tex. 329.

Under 5 U. S. Stat., p. 306, § 14, the burden of proof is on the master, in case of the boiler bursting, to show that he was not negligent. (An employé was injured and engineer had no license and was unskillful) McMahon v. Davidson, 12 Minn. 357.

While an employé may be competent and yet negligent and cause injury to a fellow servant for which the master is not liable since negligence is not always the same as incompetency, yet if the employé is in fact incompetent, lacks capacity or skill for the work assigned, his negligence causing an injury may sometimes be held to be the result of his incompetency or synonymous with it, so as to connect the injury with the master's negligence in employing such a fellow servant. And where incompetency was charged, the court in some cases has in fact spoken of the negligence of an incompetent servant causing an injury, as if it were in the particular case before them identical with incompetency.

In the preparation of this note cases in regard to contributory negligence of the employé; cases where the number of employés was inadequate; and cases where the master was attempted to be held for negligence of co-employé without regard to his incompetency,—are not included. L. T.

pointed by the superintendent; and though he had charge of the trainmen and of the movement of trains on his division, and could employ and discharge flagmen and brakemen, it is far from being shown that the master had relinquished all supervision of the work on that division, and intrusted its direction, as well as the procuring of materials and machinery and other instrumentalities necessary for the service, to his judgment and discretion. The engineman and fireman were not employed by him, but by the division superintendent; and, if the grade of his position was superior to that of the engineman, that fact did not make him a vice-principal as respects the latter. They were both engaged in the same common work, employed by the same agent of the common master, and were performing duties pertaining to the same general business; and, unless the whole current of the Maryland decisions is to be reversed, they were fellow servants of the railroad company, upon the evidence now before us. If this be so, then, even if Shull had been negligent in sending out these brakemen, and if that negligence caused the injury sued for, still the plaintiff could not recover, unless the company had not used due care in the selection of Shull, and of this there was not a particle of evidence offered.

The appellant's sixth prayer was properly rejected. There was no necessity to prove that the company had been incorporated. That fact was averred in the declaration, and was not denied by the pleas, and under section 108, article 75, of the Code, must be taken to be admitted.

This brings us to the prayers presented by the appellee. Under a local law of Washington county (sections 69, 70, article 22, Code Pub. Local Laws), we are required to consider the rejected prayers of the plaintiff, if he has excepted; and this he has done. By the defendant's exception, the plaintiff's granted prayers and the defendant's rejected prayers are brought before us. By the plaintiff's exception, his rejected prayers, as well as the defendant's granted ones, are presented for review. The court granted the plaintiff's first, seventh, and eighth prayers. We do not understand that the seventh and eighth are seriously questioned. Without discussing them, we need only say they are not open to substantial objection.

The appellee's first prayer, however, ought not to have been granted. It was objected in the argument that there was no evidence to support some of the hypotheses it contained, but as no special exception based upon that objection, and signed and sealed by the judge, appears in the record, we are not at liberty to consider it. *Albert* v. *State*, 66 Md. 334, 59 Am. Rep. 159. The prayer, after setting forth the facts, proceeds: "Then, if the said injury to the plaintiff was caused by the want of ordinary skill and experience or other unfitness on the part of the other hands, or any of them, in charge of said train, to manage and conduct the same, by reason of the intemperate state or condition of either of them," the plaintiff using due diligence, "the plaintiff is entitled to recover, provided the jury further find from the evidence that the defendant did not use reasonable care in the selection and employment of the brakemen or other hands or employés engaged with the plaintiff in conducting said cars;" that is to say, if the injury resulted from negligence caused by the intemperance of any of the train hands, the defendant would be liable, if it had failed to use due care in the selection of either of the employés on that train, even though that particular employé, thus carelessly selected, had been guilty of no negligence, and had in no way occasioned the accident. Consequently, if the jury thought the injury was caused by the drunkenness of the brakemen, and that the company had not used due care in the selection of the fireman, the company would be liable, notwithstanding the fact that the fireman had been guilty of no negligence, and had in no way produced or helped to produce the injury. Thus, the negligence of one servant, and the independent negligence of the master in employing some other servant, who had no connection with the accident, established, under this instruction, the plaintiff's right to recover. This is not the law. On the contrary, it is the negligence of a fellow servant, and the additional negligence of the master in employing that servant, whose negligence actually caused the injury, which must concur before a plaintiff can recover in a case of this character. The instruction therefore announced an obviously erroneous proposition, and was calculated to mislead the jury, because there was evidence before them from which they might have inferred that due care had not been used in the selection of the fireman, though there was no evidence from which they could have found that the fireman was responsible for the accident. The instruction should have clearly restricted the negligence of the defendant in selecting the plaintiff's fellow servants to the selection of such of them as by their incompetency, growing out of their intemperance, actually caused the injury.

The appellee's second, third, fourth, and fifth prayers were properly rejected. There was no legally sufficient evidence adduced to support them, or the several hypotheses assumed in them; and, if they had been free from other objections, this one was sufficient to justify the court in refusing to grant them.

There remains the appellant's third prayer, which the court granted, but we think erroneously granted. It told the jury, in substance, that unless the brakeman Huyett was drunk at the time of the accident, and his negligence, by reason of such drunkenness, produced or contributed to the accident, the evidence of general reputation as to his intemperance was not relevant, and could not be considered by the jury, "*unless such reputation was brought home to the knowledge of the defendant before the accident;*" and there is no such evidence of such knowledge. Had the prayer omitted the words italicized, it would have been correct, but those words superadded a condition which is manifestly inaccurate. Now, it is obvious that if Huyett was not drunk and was not negligent when the ac-

cident happened, and therefore did not cause or contribute to it, the evidence of his general reputation for intemperance was wholly irrelevant, even though that reputation had been brought home to the knowledge of the appellant before the accident, because, if he did not occasion the injury by his negligence, the fact that the master had knowledge of his bad reputation would in no way have made the master liable for an injury not caused by Huyett at all. In other words, the master's knowledge of Huyett's bad reputation had nothing whatever to do with the case if Huyett did not cause or contribute to the accident; and if Huyett did, by his intemperance, cause the accident, then it was immaterial whether the master had knowledge of his bad reputation or not, because, as already stated, the master was negligent in not knowing it. So, in either view of the question, the prayer was wrong, because of the addition of the words indicated.

For the error in granting the appellee's first instruction and the appellant's third, and for the error in rejecting the appellant's second prayer, the judgment must be reversed, and a new trial be ordered.

Judgment reversed, with costs above and below, and new trial awarded.

MICHIGAN SUPREME COURT.

James C. DEYO
v.
George H. HAMMOND, *Plf. in Err.*

(.....Mich.....)

Failure of the purchaser of a mare to have a test of her speed as compared with that of another one owned by him, made by the person and within the time agreed upon, because the mares were not in proper condition for the test, or to have the test made afterwards, will not relieve him from liability to pay an extra hundred dollars in case she is as fast as the other one on other proof of such speed.

(September 25, 1894.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to recover the contract price of a mare sold by plaintiff to defendant. *Affirmed.*

The facts are stated in the opinion.

Mr. **Fred H. Warren,** for plaintiff in error:

In the case of a condition precedent, that is, an act to be performed by the plaintiff before the defendant's liability is to accrue under his contract, the plaintiff must aver in his declaration and prove, either his performance of such condition precedent, or an offer to perform it, which the defendant rejected; or, his readiness to fulfill the condition, until the defendant discharged him, the plaintiff, from so doing, or prevented the execution of the matter to be performed by him.

Chitty, Cont. 7th Am. ed. 737; 1 Chitty, Pl. 11th ed. 321; *Brogden* v. *Marriott*, 2 Bing. N. C. 473; *Thurnell* v. *Balbirnie*, 2 Mees. & W. 786; Benjamin, Sales, 2d Am. ed. § 575; *Shear* v. *Wright*, 60 Mich. 159; *Thompson* v. *Russey*, 50 Ala. 329; *Hanley* v. *Walker*, 8 L. R. A. 207, 79 Mich. 607; *Guthat* v. *Gow*, 95 Mich. 527; *Johnson* v. *Lyon*, 75 Mich. 477; *Maryon* v. *Carter*, 4 Car. & P. 295; *Thomas* v. *Corey*, 74 Mich. 216; *Abell* v. *Munson*, 18 Mich. 306, 100 Am. Dec. 165.

Courts cannot make contracts for parties, and in interpreting them cannot be influenced by the hardships of a particular case.

Michigan Pipe Co. v. *Michigan Fire & Marine Ins. Co.* 20 L. R. A. 277, 92 Mich. 482; *Lorscher* v. *Supreme Lodge Knights of Honor*, 2 L. R. A. 206, 73 Mich. 316.

Mr. **John D. Conely,** for defendant in error:

Even in cases where a sale itself is conditional that the goods shall be satisfactory to the purchaser upon a trial to be made by him, the purchaser cannot take advantage of his own omission to make the trial to defeat payment of the purchase price.

Thompson-Houston Electric Co. v. *Brush-Swan Electric Light & Power Co.* 31 Fed. Rep. 535; *Waters Heater Co.* v. *Mansfield*, 48 Vt. 378; *Potter* v. *Lee*, 94 Mich. 140.

Long, *J.*, delivered the opinion of the court:

On January 25, 1888, the plaintiff, who resides at Jackson, this state, sold his mare, the "Shelby Maid," to defendant. The contract was made in Jackson, and the bargain, as claimed by the plaintiff, is that, after Hammond had driven the mare, he offered to give plaintiff his check for $800, and a further sum of $100 if she could go as fast as his (defendant's) mare; that Mr. Moran was to drive them, and make the test, when he had been notified by defendant that he was ready, which test was to be made within 90 days. The plaintiff further testified that Mr. Moran was to decide if plaintiff's mare could go as fast to pole as defendant's, and, if she could, then defendant was to pay plaintiff the extra $100. The defendant testified that after going to Jackson, and driving the mare, he commenced figuring with Mr. Deyo about buying her. Concerning the terms of the bargain, he gave the following testimony: "I offered Mr. Deyo $900 for the mare if she could go as fast as my bay mare.

NOTE.—The above decision that the stipulated test of speed by a certain person was not a condition precedent to the right of payment is somewhat analogous to those cases which hold a stipulation for an architect's or engineer's certificate is not absolutely binding, if the other party to the contract prevents obtaining it, or if it is withheld by fraud or collusion. For this class of cases, see *notes* to Boettler v. Tendick (Tex.) 5 L. R. A. 270; Church v. Shanklin (Cal.) 17 L. R. A. 207.]

He says: 'She can go as fast. I will guarantee her to go as fast as your mare.' I said: 'Guaranties don't do. She has got to do it herself.' I says: 'I will give you $800, and take her down there, and if she will go as fast as the bay mare I will give you $900 for her,—an extra $100. . . .' He says, 'All right,' and we made the trade then and there. The mare, if she filled the bill, was to be $900. There is no question about that; but otherwise she was to be $800. . . . I was to pay an additional $100 if the gray mare could trot as fast as the bay mare to pole. The test was to be made within ninety days, by Mr. Moran. Mr. Moran was mutually agreed upon to make the test. It would make no difference to me who drove if this mare could trot as fast as mine." The suit was brought to recover this $100 and interest, and upon the trial the jury returned a verdict in favor of the plaintiff.

It appears that defendant took the mare to Detroit, but that Mr. Moran was never notified by either of the parties to make the test, and that the test was never made; the defendant claiming that it was impossible for him to make the test within 90 days for the reason that one mare was sick and the other lame. The plaintiff testified on the trial that the defendant was to notify Mr. Moran when he was ready to make the test, and within the 90 days; while the defendant testified that, though it was mutually agreed that Mr. Moran should make the test, nothing was said about his (the defendant's) notifying Mr. Moran. Defendant's contention here is that he is not liable to pay the additional $100, as by the terms of the contract the plaintiff agreed that the mare purchased should, within 90 days, in a trial of speed to be made by Mr. Moran, trot as fast to pole as defendant's bay mare; that it was impossible to make the said trial within the time fixed by the parties by their contract by reason of circumstances over which he had no control, and for which he was not responsible; that a trial of speed by Mr. Moran, and a decision by him that plaintiff's mare was as fast to pole as defendant's, was a condition precedent to his liability to pay the $100, and, having never been fulfilled, defendant is discharged from liability. We think the contract cannot be construed in this way. Defendant, after the purchase, took the mare into his possession, and thereafter kept it. The test was to be made in Detroit. While the parties agreed to abide by Mr. Moran's decision as to the speed of the gray mare, yet the Moran test was not a vital part of the contract, but only the means provided by the parties for ascertaining the speed of the gray mare. The only condition upon which the $100 depended was that she could trot as fast as defendant's, for he said: "It would make no difference to me who drove, if this mare could trot as fast as mine." The plaintiff introduced testimony to show that his mare was 8 or 10 seconds faster than defendant's, and this testimony was undisputed. Defendant was the only party who had it within his power to have the test made, and yet he seeks to set up in this case as a defense his failure to have it made, and thus avoid the payment of the $100. The case is very similar in principle to *Potter* v. *Lee*, 94 Mich. 140. There it appeared that the plaintiff sold a number of cheeses by sample. There was testimony showing a warranty as to the quality of the cheeses. The defendant, however, said to plaintiff's agent: "You are a stranger to me, and I have only seen ten boxes of these cheese, and I don't know what is in the car. If, within the course of ten days, we find this cheese as you represent it, we will pay for them." Within the ten days some of defendant's customers rejected the cheeses, and refused to pay for them; but defendant continued to make sales for twenty-six days, and then notified the plaintiff that the cheeses were not as represented, and refused to pay for them. It was said by this court: "It is therefore evident, even if the warranty was made by Potter as to the quality of the cheeses in the car, and not examined by defendant, that defendant did not rely upon it, but preferred to make an examination for himself, and was to have ten days in which to do so. If he did not make such examination, it was his own fault." So in the present case. The plaintiff offered to guarantee the speed of his mare. The defendant rejected the offered guaranty, saying that he preferred to make a test of the speed. That he did not do so was no fault of the plaintiff's. There is no dispute about Mr. Moran's willingness to make the test. He testifies the opportunity was never given him. We think, under the undisputed testimony in the case, the court would have been justified in directing a verdict in favor of the plaintiff. In view of this, the other questions raised become immaterial.

The judgment is affirmed.

The other Justices concur.

MARYLAND COURT OF APPEALS.

Joseph MULLEN, *Appt.*,
v.
Edward F. SANBORN *et al.*

(.....Md.....)

A plaintiff in an attachment suit who comes from another state to testify therein is not privileged from service of summons while there is an action for maliciously bringing the attachment suit.

(June 20, 1894.)

APPEAL by complainant from an order of the Baltimore City Court quashing a writ

NOTE.—*Privilege of nonresident witness from suit.*

I. *Reason of the privilege.*
II. *Nature of the privilege.*
III. *The extent and limit of the privilege.*
IV. *Parties as witnesses.*
V. *Witnesses in general.*
VI. *The effect of fraud and deceit.*
VII. *Enforcement of the privilege.*
VIII. *The question of waiver.*
IX. *The question of deviation.*
X. *English doctrine.*

As to the effect upon a suit of a discharge from arrest of one arrested while attending court, see *note* to Ellis v. De Garmo (R. I.) 19 L. R. A. 560.

I. *Reason of the privilege.*

The common law has, from its earliest period, extended privilege and immunity to parties and witnesses in a law-suit while attending court, including the going and coming; the arrest of a party to a suit by civil process being regarded as a breach of the defendant's privilege. Green v. Young, 120 Ill. 189.

The foundation of the common-law rule is the policy of permitting an act which will deter suitors or witnesses from attending court. Massey v. Colville, 45 N. J. L. 119, 46 Am. Rep. 754.

It is the policy of the common law that witnesses should be produced for oral examination, and that parties should have full opportunity to be present and heard when their cases are tried; and in furtherance of such policy and the due administration of justice, suitors and witnesses from abroad are privileged from liability to suits commenced by summons as well as by capias. First Nat. Bank of St. Paul v. Ames, 39 Minn. 179; Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35, affirming Person v. Pardee, 6 Hun, 477.

It is the court's duty to foster this policy, out of which sprang the privilege. Merrill v. George, 23 How. Pr. 331.

Foreign or nonresident witnesses cannot be reached by the process of the courts, and their attendance is therefore voluntary. *Ibid.*; Brett v. Brown, 13 Abb. Pr. N. S. 295; Sherman v. Gundlach, 37 Minn. 118.

For this reason therefore their arrest on civil process is illegal. May v. Shumway, 16 Gray, 86, 77 Am. Dec. 401.

They should therefore, as far as possible, be encouraged to voluntarily come into the state where the action is pending and give their testimony in open court, but the policy of protection, as sound principles requires, and as asserted by many courts, extends as well to parties as to witnesses. Wilson v. Donaldson, 3 L. R. A. 266, 117 Ind. 356.

It is very important and right that persons leaving the place of their domicil to attend to such duties in obedience to a direct or indirect requirement of law should be protected by the law, while so engaged, from being caught up to answer to actions brought in a different place from that of their domicil. Homes v. Nelson, 1 Phila. 217.

That a suitor should feel free and safe at all times to attend within any jurisdiction without incurring the liability of being picked up and held to answer some other adverse judicial proceeding against him, is so far a rule of public policy that it has received almost universal recognition wherever the common law is known and administered. Andrews v. Lembeck, 46 Ohio St. 38.

A witness thus required to attend should feel that he is not subject, either to arrest or to the prosecution of a civil suit. Atchison v. Morris, 11 Biss. 191.

To deny him such exemption and leave him subject to a suit within such jurisdiction, would be a breach of faith upon the part of the court. Waterman v. Merritt, 7 R. I. 245.

By a contrary doctrine subjecting him to the necessity of remaining or returning to litigate foreign suits a serious obstacle would be interposed to his voluntary attendance. Merrill v. George, 23 How. Pr. 331; Kauffman v. Kennedy, 25 Fed. Rep. 785.

And as the judgment thus obtained would conclude him in all jurisdictions, its effect would be to deter him from coming at all. Sherman v. Gundlach, 37 Minn. 118.

Such a witness would refuse to come within the state to give testimony unless he was sure of protection. Hollender v. Hall, 58 Hun, 604, 13 N. Y. Supp. 759, 33 N. Y. S. R. 848.

Parties would be prevented from attending, delays would ensue and injustice be done. Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35.

It would obstruct the administration of justice. *Re* Healey, 53 Vt. 694, 38 Am. Rep. 713.

And work a miscarriage thereof, especially in a criminal case where the witness must meet the accused face to face, for no one would voluntarily go into a foreign state to give testimony in a suit if he were liable to be put to the expense of a law-suit in a strange forum. Kauffman v. Kennedy, 25 Fed. Rep. 785.

Courts of justice ought to be open and accessible to suitors, who ought to be permitted to approach and attend the courts in the prosecution of their claims, and the making of their defenses without fear of molestation or hindrance; their attention ought not to be distracted from the prosecution or defense of the pending suit, otherwise they might be deterred from prosecuting their just rights or making their just defenses to a suit by reason of their liability to suit in a foreign jurisdiction. Baldwin v. Emerson, 16 R. I. 304.

The reason of the rule extends to every obstacle that stands as a barrier, in the way of the preattendance of witnesses in a court of justice. Merrill v. George, 23 How. Pr. 331.

Its object is to encourage witnesses from abroad to come forward voluntarily and testify. Sherman v. Gundlach, *supra*.

Whether a man wishes to attend the court as a party or a witness, he should be able to do so under its protection. Halsey v. Stewart, 4 N. J. L. 366; Mitchell v. Huron Circuit Judge, 53 Mich. 542.

Such immunity works no injustice to any one, as, if the witness does not come into the state there would be no opportunity to serve process upon him. Sherman v. Gundlach, 37 Minn. 118.

Principles of public policy require that no un-

of summons and the return thereon in an action brought to recover damages for wrongfully and maliciously suing out an attachment on the ground that service had been obtained on defendant while he was in the state as a witness in another suit. *Reversed.*

The facts are stated in the opinion.

Messrs. **R. W. Applegarth,** and **H. C. Kennard** for appellant.

Messrs. **Hinckley & Morris,** for appellees: A nonresident plaintiff coming to this state solely to testify in court and intending to re-

---

necessary obstacles shall be interposed to prevent the attendance and examination of witnesses in the presence of the court and jury. Seaver v. Robinson, 3 Duer, 622; Tamkin v. Starkey, 7 Hun, 479; Mitchell v. Huron Circuit Judge, *supra;* Wilson v. Donaldson, 3 L. R. A. 263, 117 Ind. 356; Moletor v. Sinnen, 7 L. R. A. 817, 76 Wis. 308.

Courts of justice are bound to see that no improper use is made of such proceedings, which would look like a violation of good faith and perversion of measures to be resorted to in order to bring the party within their jurisdiction. Moletor v. Sinnen, *supra.*

The protection of parties and witnesses demands it. Mitchell v. Huron Circuit Judge, *supra;* Vincent v. Watson, 1 Rich. L. 194; Wilson v. Donaldson, *supra.*

It affects the integrity of the administration of justice, in the protection of which the courts have ordained that no man in attendance upon the courts of deliberation shall be interfered with or the administration of justice interrupted by the service of process, the doctrine having its origin in those cases where the process was one of arrest. McIntire v. McIntire, 5 Mackey, 344; Mitchell v. Huron Circuit Judge, *supra.*

A party who could not attend to his suit without being liable to such service would be under personal restraint, from which those engaged in the administration of justice have a right to be free. *Re* Healey, 53 Vt. 694, 38 Am. Rep. 713; Bridges v. Sheldon, 7 Fed. Rep. 36.

The immunity does not depend upon statutory provisions, but is necessary for the due administration of justice. Sherman v. Gundlach, 37 Minn. 118; *Ex parte* Cobbett, 7 El. & Bl. 955, 26 L. J. Q. B. 293, 3 Jur. N. S. 665; First Nat. Bank of St. Paul v. Ames, 39 Minn. 179; *Re* Healey, *supra.*

The necessities of the judicial administration would be embarrassed if such rule were not enforced. Juneau Bank v. McSpedan, 5 Biss. 64; Byler v. Jones, 22 Mo. App. 623; Wilson v. Donaldson, 3 L. R. A. 266, 117 Ind. 356; Halsey v. Stewart, 4 N. J. L. 366; Mitchell v. Huron Circuit Judge, *supra;* Palmer v. Rowan, 21 Neb. 452, 59 Am. Rep. 844; Tribune Asso. v. Sleeman, 12 N. Y. Civ. Proc. Rep. 21; Matthews v. Tufts, 87 N. Y. 568.

And without such exemption their attendance might not be readily obtained. Parker v. Manco, 61 Hun, 519.

In *Re* Healey, 53 Vt. 694, 38 Am. Rep. 713, it was stated as a well-settled rule of law.

The rule exists in order that causes may be fully heard and justice administered in an orderly manner. Nichols v. Horton, 4 McCrary, 567.

The protection is not chiefly the privilege of the person, but is granted in the necessity of the public in order that the courts may not be embarrassed or impeded in the conduct of their business. Baldwin v. Emerson, 16 R. I. 304.

A party should be permitted to approach the courts, not only without subjecting himself to evil, but even free from the fear of molestation or hindrance. Halsey v. Stewart, 4 N. J. L. 366.

As a breach of privilege. Jacobson v. Hoemer, 76 Mich. 234.

Such an arrest was held an invasion of the prerogative of the court, and entitled him to a discharge. Jones v. Knauss, 31 N. J. Eq. 211.

No lawful thing founded upon a wrongful act can be supported. Luttin v. Benin, 11 Mod. 50.

In Hayes v. Shields, 2 Yeates, 222, it is said the party's attention to his own business in the suit depending is distracted by other objects and he is subjected to the inconvenience of attending an action at a considerable distance from his own place of abode, contrary to the wise indulgence of the law.

The arrest of one attending as a witness may be a contempt of the court as if made in the face of the court, against which the court must protect. Vincent v. Watson, 1 Rich. L. 194.

A person ordering an arrest of a witness is punishable for contempt of court for interfering with its business. Smith v. Jones, 76 Me. 138, 49 Am. Rep. 598.

The same reasons for exempting a nonresident witness from arrest exists in favor of exempting him from service of a summons in a civil action. Sherman v. Gundlach, 37 Minn. 118.

But the reason does not apply to a case in which the defendant is arrested on a criminal charge, and taken into a foreign state to answer such charge. Byler v. Jones, 22 Mo. App. 623.

In Holmes v. Nelson, 1 Phila. 217, it was contended that the defendant, a foreign corporation, was not entitled to the privilege, but the court held that the fact that the defendant was a citizen of another state was no ground of the exemption; that such contention was prevented by section 2, article 4, of the Constitution of the United States, declaring that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, the court stating that such article was a special application of the grand Christian rule of intercourse, "Whatever ye would that men should do to you, do ye even so to them."

In Day v. Harris, 37 N. Y. S. R. 322, 59 Hun, 628, the court approved the principles established by Matthews v. Tufts, 87 N. Y. 568. The essential condition of the rule and ground of the exemption is, that the person claiming it shall come within the jurisdiction of the court issuing the process as such party or witness.

The reason for the distinction is, that in the case of a resident he could be immediately prosecuted, and if the right to do so did not exist, could be arrested again, and therefore it was not to his prejudice but rather to his benefit to require him to endorse his appearance as upon a non-bailable process, while in the case of a nonresident the court refused to acquire jurisdiction of his person by a legal arrest, the effect of such a discharge being necessarily to dismiss the action. Merrill v. George, 23 How. Pr. 331.

II. *Nature of the privilege.*

The nature and extent of the privilege which the law accords to witnesses is not a natural right, it is contrary to common right; it is not an absolute right such as belongs to members of the royal family in England, or to embassadors or some others, nor the case of total exemption from arrest such as the law extends to persons discharged from arrest by bankruptcy or insolvency proceedings, or where the law forbids arrest for the collection of demands. Smith v. Jones, 76 Me. 138, 49 Am. Rep. 598.

Yet the privilege to parties to judicial proceedings, as well as others required to attend upon them, of going to the place where they are held, and remaining so long as is necessary, and returning wholly free from the restraint of process in other civil proceedings, has always been well set-

turn home the same day, by the first convenient train, is privileged from summons as he leaves the court.

Bolgiano v. *Gilbert Lock Co.* 73 Md. 132.

Sanborn was both a suitor and a necessary witness, and privileged in both capacities. He was obliged to be here to testify, as he could not testify on commission and was so advised by counsel.

Goodman v. *Wineland*, 61 Md. 455.

If there is room to contend that the *Bolgiano Case* does not go so far as the present case, see

---

tled and favorably enforced. Bridges v. Sheldon, 18 Blatchf. 507.

The proceedings, however, must be in court. Parker v. Manco, 61 Hun, 519.

The exemption rule is not by force of any statute. Damkin v. Starkey, 7 Hun, 479; Sheehan v. Bradford, B. & K. R. Co. 3 N. Y. Supp. 790.

The privilege arises out of the authority and dignity of the court where the cause is pending, and protection against the violation of the privilege is to be enforced by that court and will be respected by others. *Re* Healey, 53 Vt. 694, 38 Am. Rep. 713.

It is one of the necessities of the administration of justice, and courts would often be embarrassed if suitors or witnesses should be molested with process while attending court. Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35; Parker v. Manco, *supra*; Parker v. Hotchkiss, 1 Wall. Jr. 269; Sheehan v. Bradford, *supra*; Moletor v. Sinnen, 7 L. R. A. 817, 76 Wis. 308.

The privilege exists to subserve public interest. Moletor v. Sinnen, *supra*.

It is founded upon valid considerations of public policy. Sherman v. Gundlach, 37 Minn. 118.

And is for the benefit of parties, enabling them to obtain the testimony of witnesses who might otherwise be reluctant to attend the court. May v. Shumway, 16 Gray, 86, 77 Am. Dec. 401.

It is a policy of the law established for the facilitation of the public business. Smith v. Jones, 76 Me. 138, 49 Am. Rep. 598.

As such it has received almost universal recognition wherever the common law is known and administered. Andrews v. Lembeck, 45 Ohio St. 38.

Rendering the privilege of justice free and untrammeled, and protecting from improper interference all who are concerned in it. Huddeson v. Prizer, 9 Phila. 65.

The claim of privilege must, however, in general be taken strictly. Chaffee v. Jones, 19 Pick. 261.

It does not depend upon the writ of subpœna or of protection, but grows out of the privilege established by the law and constitutes a continuing order. *Re* Healey, 53 Vt. 694, 38 Am. Rep. 713; Brett v. Brown, 13 Abb. Pr. N. S. 295; Palmer v. Rowan, 21 Neb. 452, 59 Am. Rep. 844; Sherman v. Gundlach, *supra*.

There is no difference as regards this privilege between writs of summons and writs of capias, the exemption tending to both alike and is well settled. Huddeson v. Prizer, *supra*; Richards v. Goodson, 2 Va. Cas. 331.

The service of a subpœna makes no difference, and would be an idle ceremony. Sherman v. Gundlach, *supra*.

A witness from a foreign jurisdiction being under the protection of the law. Wilson v. Donaldson, 3 L. R. A. 266, 117 Ind. 356.

In the case of a nonresident suitor or witness, the weight of authority is to the effect that the immunity is absolute from the service of any process, unless the case is exceptional. *Re* Healey, 53 Vt. 694, 38 Am. Rep. 713.

Their immunity from the service of process for the commencement of civil actions against them is absolute *eundo, morando et redeundo*, both upon principle and authority. Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35; Richards v. Goodson, 2 Va. Cas. 381; Seaver v. Robinson, 3 Duer, 622; Sanford v. Chase, 3 Cow. 381.

And the party if arrested will be discharged absolutely. Merrill v. George, 23 How. Pr. 331; Hopkins v. Coburn, 1 Wend. 292; Frisbie v. Young, 11 Hun, 474.

The privilege of parties and witnesses is alike the privilege of the court and the citizen; it protects the court from interruption and delay, takes away the inducement to disobey the process and enables the citizen to prosecute his rights without molestation, and procures the attendance of all who are necessary for his defence or support. Halsey v. Stewart, 4 N. J. L. 366.

It is the privilege of the court, yet it is the protection of the suitor or witness to whom the common law gives a right of privilege, in that case, in lieu of which summary relief on motion is now substituted and this cannot be denied on proper grounds shown, for there is no such thing in the law as writs of grace and favor issuing from the judges, they are all writs of right and not of courts. United States v. Edme, 9 Serg. & R. 147.

The privilege, however, has been held to be not that of the person attending, but of the court which he attends. *Re* Healey, 53 Vt. 694, 38 Am. Rep. 713; Smith v. Jones, 76 Me. 138, 49 Am. Rep. 598; Parker v. Hotchkiss, 1 Wall. Jr. 269; Hunter v. Cleveland (Ohio) 1 Brev. 167; Hayes v. Shields, 2 Yeates, 222; *Ex parte* Everts, 2 Disney (Ohio) 33.

And as such has to be vindicated by a discharge when an arrest has taken place in violation of their privilege. Com. v. Daniel, 4 Clark (Pa.) 49.

The right is afforded, not so much for the witness as for the party. Smith v. Jones, *supra*.

Yet it has been held that the privilege does not concern the dignity of the court merely, but is primarily, and above all conferred for the just protection of the party himself, in order that the performance of a duty, or the submission to process which the party cannot resist, shall not be made use of to his injury or oppression. People v. Detroit Super. Ct. Judge, 40 Mich. 729.

It is the privilege of a party to an action or suit to attend the court and be examined as a witness or not, as he may be advised, without being subjected to civil prosecution while so remaining or being examined. First Nat. Bank of St. Paul v. Ames, 39 Minn. 179.

The privilege is personal, part of the man's individual freedom, essential to the defense of his legal rights, and designed to protect the feeble and the poor from oppression. Key v. Jetto, 1 Pittsb. 117; Smith v. Jones, *supra*; Huddeson v. Prizer, 9 Phila. 65.

The protection afforded by the law is a personal privilege of which the party entitled to rely upon it, may avail himself to prevent or defeat an arrest. Brown v. Getchell, 11 Mass. 11.

It has been considered not only the privilege of the party but of the people. Anderson v. Rountree, 1 Pinney, 113.

As the privilege of a court the incidental immunity to the party is scarcely the subject of abuse, being exercisable, or not, in each particular case, as the process of substantial justice may seem to require. Parker v. Hotchkiss, 1 Wall. Jr. 269.

The law does not declare that a witness shall not be arrested, but gives him the right to free himself from arrest if he desires to. Smith v. Jones, *supra*.

Protection to a witness ought to be at least as extensive as to a party. United States v. Edme, 9 Serg. & R. 147.

The fact that he was not summoned and ob-

the following cases, cited with approval by this court, which are exactly on "all fours" with the present case.

Mitchell v. *Huron Circuit Judge*, 53 Mich. 541; *First Nat. Bank of St. Paul* v. *Ames*, 39 Minn. 179; *Matthews* v. *Tufts*, 87 N. Y. 568; *Person* v. *Grier*, 66 N. Y. 124, 23 Am. Rep. 35; *Wilson* v. *Donaldson*, 3 L. R. A. 266, 117 Ind. 356; *Small* v. *Montgomery*, 23 Fed. Rep. 707. See also *Dungan* v. *Miller*, 37 N. J. L. 182; *Kauffman* v. *Kennedy*, 25 Fed. Rep. 785; *Sherman* v. *Gundlach*, 37 Minn. 118; *Palmer* v. *Rowan*, 21

---

tained no writ of protection, does not alter the case. May v. Shumway, 16 Gray, 86, 77 Am. Dec. 401.

The right is not so much to avoid the arrest, but to terminate it. Smith v. Jones, *supra*.

It is a conditional or contingent right of the witness which may be taken advantage of by him or not as he pleases. *Ibid.*

Therefore judges are not bound judicially to notice a right of privilege, nor to grant it without claim. Gyer v. Irwin, 4 U. S. 4 Dall. 187, 1 L. ed. 762.

It is to some extent a discretionary matter with a court or judge, whether a witness shall be discharged upon arrest. Smith v. Jones, *supra*.

When it is not a mere cover to a skulking debtor, it ought to be considered liberally. United States v. Edme, *supra*.

Yet it is not an actual right. Smith v. Jones, *supra*.

The arrest of a person who has a special privilege or exemption is in no case void but voidable, merely, and an action of false imprisonment will not lie against the officer or party issuing out the process. Fletcher v. Baxter, 2 Aik. 224; Smith v. Jones, *supra*; People v. Detroit Super. Ct. Judges, 40 Mich. 729.

It remains valid until avoided. Smith v. Jones, *supra*.

A person ordering an arrest may be punished for contempt of court for interference with its business. *Ibid.*

An arrest is ceremonious with actual detention of the person of the party arrested, and does not mean merely a summons or citation. Huntington v. Shultz, Harp. L. 452, 18 Am. Dec. 660.

An arrest should not be valid, even for the purpose of giving jurisdiction to the court out of which the process issues, more especially where the witness is attending from a foreign state. Seaver v. Robinson, 3 Duer, 622; Sanford v. Chase, 3 Cow. 381.

III. *The extent and limit of the privilege.*

Generally, at common law, parties and witnesses are liable to be sued though their bodies cannot be detached or detained, and hence it is stated that they are entitled to their liberty, but the privilege extends no further, the suit not abating for any such cause. Bishop v. Vose, 27 Conn. 1.

From the first it has been the law, both common and statute, that a foreign citizen if found in the state, whether there on business or pleasure, or hastening through the state with railroad speed, is liable to be sued like any other person and is not entitled to any personal or peculiar immunity. *Ibid.*

But a defendant is not amerable to process unless he is in, or comes voluntarily within the territorial jurisdiction of the court. Wanzer v. Bright, 52 Ill. 42; Williams v. Bacon, 10 Wend. 636; Carpenter v. Spooner, 2 Sandf. 717; Seaver v. Robinson, 3 Duer, 622.

It is a general principle, however, that parties and witnesses, and all who have any relation to a cause which calls for their attendance in court as bail, are privileged during their attendance upon court, and in going to and returning from it, whether they are compelled to attend or not. Fletcher v. Baxter, 2 Aik. 224.

Parties and witnesses attending in good faith any legal tribunal, whether a court of record or not, having power to pass upon the rights of the person attending, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning, whether they are residents of the state or come from abroad; whether they attend on summons or voluntarily; and whether they have or have not obtained a writ of protection. Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370.

In point of time, the privilege exists during the time fairly occupied in going to and returning from the place of trial or hearing, as well as during the time when the party is in actual attendance at the place of trial. Nichols v. Horton, 4 McCrary, 567, 14 Fed. Rep. 327; Brooks v. Farwell, 2 McCrary, 230; Juneau Bank v. McSpedan, 5 Biss. 64; Bridges v. Sheldon, 7 Fed. Rep. 17; Plimpton v. Winslow, 9 Fed. Rep. 365; Lyell v. Goodwin, 4 McLean, 29; Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35; Holmes v. Nelson, 1 Phila. 217; Smythe v. Banks, 4 U. S. 4 Dall. 329, 1 L. ed. 854; Moletor v. Sinnen, 7 L. R. A. 817, 76 Wis. 308; Wilbur v. Boyer, 1 W. N. C. 154; Gregg v. Sumner, 21 Ill. App. 110; *Re* Dickenson, 3 Harr. (Del.) 517; Henegar v. Spangler, 29 Ga. 217.

With a reasonable time for the witness to return home after the rising of the court. *Ex parte* Hall, 1 Tyler (Vt.) 274; Schlesinger v. Foxwell, 1 N. Y. City Ct. Rep. 461; Brett v. Brown, 13 Abb. Pr. N. S. 295.

It is not sufficient, however, that he is a nonresident of the jurisdiction; it must appear that he came from without the jurisdiction upon the occasion of the judicial proceeding which he was attending and for the purpose of attending it. Day v. Harris, 59 Hun, 623, 37 N. Y. S. R. 322, 14 N. Y. Supp. 3.

The immunity does not extend merely to particular individuals, but to all persons under certain circumstances, on the principle that where the law requires any duty of the citizen, it will protect him in the discharge of that duty, and that individuals cannot demand the use of public civil process, so as to arrest or interfere with others in the performance of public duties, or of duties required by public process. Holmes v. Nelson, *supra*.

The rule has been thus expressed: "All parties to a suit, and their witnesses, are, for the sake of public justice, protected from arrest in coming to, attending upon, and returning from the court, or as it is usually termed *eundo, morando et redeundo*." Greer v. Young, 120 Ill. 189, reversing Greer v. Youngs, 17 Ill. App. 106. To the same effect, Palmer v. Rowan, 21 Neb. 452, 59 Am. Rep. 844.

The immunity is secured to all jurors, parties, witnesses, law agents, and even common agents of the parties. Holmes v. Nelson, 1 Phila. 217; Huddeson v. Prizer, 9 Phila. 65.

To all who have any relation to a cause as parties, attorneys, bail, etc. Christian v. Williams, 111 Mo. 429.

And to a nonresident officer of a foreign corporation attending for the purpose of giving evidence. Mulhearn v. Press Pub. Co. 11 L. R. A. 101, 53 N. J. L. 153.

If the cause calls for their attendance in court. Baldwin v. Emerson, 16 R. I. 304; First Nat. Bank of St. Paul v. Ames, 39 Minn. 179.

The doctrine of exemption was upheld in Norris v. Hasler, 23 Fed. Rep. 581.

Even though attending voluntarily. Ballinger v. Elliott, 72 N. C. 596; Bolgiano v. Gilbert Lock Co. 73 Md. 132.

Neb. 452, 59 Am. Rep. 844; *Miles* v. *McCullough*, 1 Binn. 77; *Atchison* v. *Morris*, 11 Fed. Rep. 582; *Massey* v. *Colville*, 45 N. J. L. 119, 46 Am. Rep. 754; *Huddeson* v. *Prizer*, 9 Phila. 65; 1 Whart. Ev. § 389; Freeman's *note*, 77 Am. Dec. 401; Rorer, Interstate Law, 2d ed. p. 32; Comyn's Dig. title *Privilege;* 1 Greenl. Ev. §§ 316,-318; Taylor, Ev. § 1330 p. 1126; 22 Am. & Eng. Encyclop. Law, p. 163, title, *Service of Process*, 8, 3; 3 Bl. Com. 289; *Cole* v. *Hawkins*, 2 Strange, 1094; *May* v. *Shumway*, 16 Gray, 86, 77 Am.

The court being bound to protect them. Norris v. Beach, 2 Johns. 294. To the same effect, Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35; Palmer v. Rowan, 21 Neb. 452, 59 Am. Rep. 844.

Even if summoned. Palmer v. Rowan, *supra;* Sherman v. Gundlach, 37 Minn. 118; Brett v. Brown, 13 Abb. Pr. N. S. 295.

Whether attending with or without a subpœna. Pollard v. Union Pac. R. Co. 7 Abb. Pr. N. S. 70; Walpole v. Alexander, 3 Dougl. 45; Rogers v. Bullock, 3 N. J. L. 109; Dixon v. Ely, 4 Edw. Ch. 557, 6 L. ed. 973; Dungan v. Miller, 37 N. J. L. 182; *Re* Healey, 53 Vt. 694, 38 Am. Rep. 713; Brett v. Brown, 13 Abb. Pr. N. S. 295; May v. Shumway, 16 Gray, 86, 77 Am. Dec. 401.

The principles of exemption rest and apply as well to parties as to witnesses. First Nat. Bank of St. Paul v. Ames, 39 Minn. 179; Mitchell v. Huron Circuit Judge, 53 Mich. 542; Pollard v. Union Pac. R. Co. and Dungan v. Miller, *supra;* Merrill v. George, 23 How. Pr. 331; Mackay v. Lewis, 7 Hun, 83.

And to strangers as to citizens. Holmes v. Nelson, 1 Phila. 217.

Where they are necessarily attending any court. First Nat. Bank of St. Paul v. Ames, *supra.*

Having been brought into such foreign state by process of law, they cannot, while there, be called to answer in another action. Brooks v. Farwell, 2 McCrary, 220.

This is so whether the privilege be regarded as a personal one to the witness or a privilege of the court. Bolgiano v. Gilbert Lock Co. 73 Md. 132.

The exemption from arrest in returning home is never allowed but for the sake of enabling the party to go and stay freely without any apprehension, even in regard to his return home. Scott v. Curtis, 27 Vt. 762.

The courts will not take jurisdiction of a party thus attending in good faith as a witness during the continuance of his freedom from arrest. Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35.

The point has never been doubted. Seaver v. Robinson, 3 Duer, 622.

It is bad faith to commence a civil action and attempt to serve a summons and an order of arrest therein, before conviction on a criminal charge, and before the defendant has an opportunity to return. Compton v. Wilder, 40 Ohio St. 130.

And the tendency of the courts is to enlarge the privilege to all forms of process of a civil nature. Bolgiano v. Gilbert Lock Co. *supra.*

The protection extends to all legal tribunals of a judicial character, whether strictly courts of record or not, recognized by the laws of the state and having power to pass upon the rights of persons attending them. Wood v. Neale, 5 Gray, 538; Larned v. Griffin, 12 Fed. Rep. 590; Bolgiano v. Gilbert Lock Co. *supra.*

The term "court" has been thus construed: "The privilege is granted in all cases where the attendance of the party or witness is given in any matter *pending before a lawful tribunal having jurisdiction of the cause.*" Greer v. Young, 120 Ill. 189, reversing Greer v. Youngs, 17 Ill. App. 106.

In civil suits of the United States courts there is the same privilege to suitors and witnesses as the law gives in actions by one citizen against another. United States v. Edme, 9 Serg. & R. 147; Holmes v. Nelson, 1 Phila. 217.

Such a witness in the circuit court is privileged from service of summons in an action in a state court. Atchison v. Morris, 11 Fed. Rep. 582.

It extends to any tribunal sitting in the nature of a court in the administration of justice. Fletcher v. Baxter, 2 Alk. 224.

Not only to persons who are in the immediate presence of the judge of the courts of record, but to those also who are in attendance upon the subordinate tribunals and officers appointed by those courts, to assist them in the discharge of their duties to witnesses subpœnaed by commissioners. Huddeson v. Prizer, 9 Phila. 65.

Wherever attendance is a duty in conducting any proceedings of a judicial nature, as commissions of bankrupt, a judge at his chambers, and a witness attending an arbitration under a rule of court, a witness before a master in chancery, to make an affidavit. United States v. Edme, *supra;* Bridges v. Sheldon, 18 Blatchf. 507.

To proceedings before any person substituted *pro hac vice* in the place of the court. Holmes v. Nelson, 1 Phila. 217.

Whether taking place in court or not. People v. Detroit Super. Ct. Judge, 40 Mich. 729.

The place of attendance is immaterial. Dungan v. Miller, 37 N. J. L. 182.

But the extension does not protect a witness or suitor of a tribunal unknown to our laws. Holmes v. Nelson, *supra.*

Nor where the evidence is taken out of court. Parker v. Manco, 61 Hun, 512.

It is not limited to mere exemption from arrest. Martin v. Ramsey, 7 Humph. 220.

Witnesses should be protected against molestation by means of the process of the court in any form; the practice of extending such protection must be upheld. Lamkin v. Starkey, 7 Hun, 479.

There must be an opportunity to return. Compton v. Wilder, 40 Ohio St. 130.

A reasonable time must elapse after the discharge for this purpose before service can be made. Palmer v. Rowan, 21 Neb. 452, 59 Am. Rep. 844; Schlesinger v. Foxwell, 1 N. Y. City Ct. Rep. 461; *Ex parte* Hall, 1 Tyler (Vt.) 274; Brett v. Brown, 13 Abb. Pr. N. S. 295.

It extends to a witness preparing for home served with summons the morning after the trial. Wilbur v. Boyer, 1 W. N. C. 154, where the witness had remained till after verdict.

His acts must be bona fide, and without unreasonable delay. Sherman v. Gundlach, 37 Minn. 118; Bolgiano v. Gilbert Lock Co. 73 Md. 132.

It extends for so long a time as is fairly required in going and returning. Gregg v. Sumner, 21 Ill. App. 110.

Such time is measured according to the circumstances. Wilbur v. Boyer, *supra.*

Liberality is exercised in regard to the reasonableness of the time. Salhinger v. Adler, 2 Robt. 704.

The courts will not nicely scan the time of the return of parties, witnesses, etc. Hayes v. Shields, 2 Yeates, 222.

It would be too severe a rule to say that a witness must take the first train after leaving court. Wilbur v. Boyer, *supra.*

The privilege extends to the protection of the party at his lodgings. *Ex parte* Hurst, 1 Wash. C. C. 186.

But if he stays for purposes of business or pleasure he is not protected. Rex v. Piatt, 3 W. N. C. 187; Smythe v. Banks, 4 U. S. 4 Dall. 329, 1 L. ed. 854; Finch v. Gallagher, 12 N. Y. Supp. 427, 25 Abb. N. C. 404.

Dec. 401, *note; Hayes* v. *Shields*, 2 Yeates, 222; *Scarer* v. *Robinson*, 3 Duer, 622; *Re Healey*, 53 Vt. 694, 38 Am. Rep. 717, *note*.

Mr. **Bernard Carter** also for appellees.

Fowler, J., delivered the opinion of the court:

Edward F. Sanborn and Arthur C. Mann, trading as Sanborn & Mann, residing and doing business in Massachusetts, issued out of the Baltimore City Court an attachment on original process against Joseph Mullen, a citizen of this state and a resident of Baltimore City. This attachment was subsequently quashed, and the short note case was prosecuted, but without success. Sanborn,

---

It extends to exemption from suits or other civil process as not only the privilege of the party but of the people. Anderson v. Roundtree, 1 Pinney, 115.

Not only to arrest, but also freedom from action. Merrill v. George, 23 How. Pr. 331.

It extends to an attachment for nonpayment of costs only. Snelling v. Watrous, 2 Paige, 314, 2 L. ed. 923.

And to the taking upon a writ of *ne exeat*. Dixon v. Ely, 4 Edw. Ch. 557, 6 L. ed. 973.

To arrest under bail process. Vincent v. Watson, 1 Rich. L. 134.

His privilege protects him. Jenkins v. Smith, 57 How. Pr. 171.

In an action against him personally, or in a fiduciary capacity. Grafton v. Weeks, 7 Daly, 523.

It is enforced to protect not only the body of the suitor from arrest, but his horse and other things necessary for his journey which would otherwise be attachable by the custom of London from seizure for debt. Bridges v. Sheldon, 18 Blatchf. 507; Year Book, 20 Hen. VI. 10.

In all cases coming within its reason and true purpose, the court will not hesitate to enforce it. Nichols v. Horton, 4 McCrary, 567; Pollard v. Union Pac. R. Co. 7 Abb. Pr. N. S. 70.

And without a writ of protection. Larned v. Griffin, 12 Fed. Rep. 590; Palmer v. Rowan, 21 Neb. 452, 59 Am. Rep. 844; Schlesinger v. Foxwell, 1 N. Y. City Ct. Rep. 461.

The claim of protection not being affected by reason of the service of a summons to attend. Atchison v. Morris, 11 Biss. 221.

Upon principle as well as upon authority, the immunity from the service of process for the commencement of civil actions against them, is absolute *eundo, morando et redeundo*. Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35; Schlesinger v. Foxwell, and Larned v. Griffin, *supra*.

The court will not sanction the service of a summons or mesne process upon a nonresident, coming into the state for the purpose of prosecuting or defending a cause of his own. Juneau Bank v. McSpedan, 5 Biss. 64.

It does not extend to the taking of depositions before a notary who performs purely ministerial functions, and cannot decide questions or determine any matter affecting the rights of the parties, not having jurisdiction of the cause. Greer v. Young, 120 Ill. 189, reversing Greer v. Youngs, 17 Ill. App. 106; Parker v. Manco, 61 Hun, 519.

Yet it has been held to be no objection to the doctrine where the parties consent to the testimony being taken before a notary, instead of before an officer of the court, appointed for the purpose, the testimony given being as much in the action as if it had been given in court. Hollender v. Hall, 13 N. Y. Supp. 759, affirmed, 58 Hun, 604, 33 N. Y. S. R. 848; Larned v. Griffin, *supra*.

Nor where the testimony is taken *de bene esse* before a referee or notary. Marks v. La Société Anonyme de L' Union des Papeteries, 19 N. Y. Supp. 470, 46 N. Y. S. R. 660; Hollender v. Hall, 13 N. Y. Supp. 758, 33 N. Y. S. R. 848.

In Andrews v. Lembeck, 46 Ohio St. 38, the privilege was extended to a party attending court upon the hearing of an injunction.

To the case of a party to a suit in equity attending before a master or an examiner, the party having been served with summons. Huddeson v. Prizer, 9 Phila. 65; Larned v. Griffin, 12 Fed. Rep. 590; Dungan v. Miller, 37 N. J. L. 182; Scott v. Curtis, 27 Vt. 762; First Nat. Bank of St. Paul v. Ames, 39 Minn. 179.

Even though voluntary. Dungan v. Miller, *supra*.

And in vacation. Vincent v. Watson, 1 Rich. L. 194.

Also to one of several defendants so attending. Dungan v. Miller, *supra*.

And to such attendance in a suit for the infringement of letters patent. Plimpton v. Winslow, 9 Fed. Rep. 365.

And to the taking of testimony before a master or commissioner, preparatory to the final submission of the cause to a court. Nichols v. Horton, 4 McCrary, 567, 14 Fed. Rep. 327.

Also to the taking of testimony upon motion before a supreme court commissioner. Mulbearn v. Press Pub. Co. 11 L. R. A. 101, 53 N. J. L. 153.

To the taking of depositions upon commission as a contempt of court under section 723, Rev. Stat. of the United States. Bridges v. Sheldon, 18 Blatchf. 507, where a defendant so attending was served with summons.

To a witness returning home from attending before a magistrate under a rule of court. United States v. Edme, 9 Serg. & R. 147.

And to the attendance before arbitrators, commissioners. Larned v. Griffin, 12 Fed. Rep. 590; Farmer v. Robbins, 47 How. Pr. 415; Sheehan v. Bradford, R. & K. R. Co. 3 N. Y. Supp. 790.

Whether appointed by rule of court and master in chancery, or on the execution of a writ of inquiry. Dungan v. Miller, 37 N. J. L. 182.

There is no difference in principle or practice, whether the parties are necessarily and in good faith attending the trial of an action in court, or an examination before a referee or a master in chancery. First Nat. Bank of St. Paul v. Ames, 39 Minn. 179.

The privilege extends to freedom from arrest in attending upon an action referred for the court's decision upon a case stated. *Ex parte* McNeil, 6 Mass. 245.

To the service of a summons upon a party while attending an appeal of his case from the court below. Miles v. McCullough, 1 Binn. 77.

It extends to attendance upon the court in the case of a suit adjourned from day to day owing to the illness of the other party. Ellis v. De Garmo, 19 L. R. A. 560, 17 R. I. 715.

If a defendant is really in the state to protect his own interest in the taking of testimony to be used against him in another state, the principles enunciated in the New York cases are looked upon as broad enough to protect him *eundo, morando et redeundo*. Greer v. Young, 120 Ill. 184.

The mere service of the summons upon a nonresident, when in another state, for the purpose of taking depositions to be used in an action to which he is a party in his own state, imposes no greater hardship upon him than to be served with process out of his own state when attending to any other kind of business. Greer v. Young, 120 Ill. 189, reversing Greer v. Youngs, 17 Ill. App. 106.

Yet the privilege has been held to extend to the taking of depositions upon commission. Bridges v. Sheldon, 18 Blatchf. 507, under rule of court.

one of the plaintiffs in the attachment suit, was advised by his counsel here that it would be necessary for him to testify as a witness at the trial of the short note case, and it is admitted he came here for that purpose.

The case, however, was continued and Sanborn having left the court-room in Baltimore was about to depart from this state for his home in Massachusetts, when he was summoned as a defendant in the cause brought by the appellant, Mullen, to recover damages for wrongfully, maliciously, and without apparent cause issuing the attachment above mentioned. Sanborn moved to quash the writ of summons and the return of the sheriff thereon, on the ground that being a witness from

---

Kinsman v. Reinex, 2 Miles (Pa.) 200; Wetherill v. Seitzinger, 1 Miles (Pa.) 237.

If a citizen or resident of the state, he is entitled to discharge on entering his appearance, and if from a foreign state, absolutely. Pollard v. Union Pac. R. Co. 7 Abb. Pr. N. S. 70.

The privilege of a witness from arrest requires an absolute discharge from arrest, and makes such arrest a contempt of court under 3 Rev. Stat. 402, § 51. *Ibid.*

The power to discharge suitors and witnesses is inherent in every court, but will not be exercised except under special circumstances. Kinsman v. Reinex, and Wetherill v. Seitzinger, *supra*.

It has been held there is no immunity from the service of process, because the party is only temporarily within the jurisdiction of the court. McIntire v. McIntire, 5 Mackey, 344.

In Blight v. Fisher, 1 Pet. C. C. 41, the privilege of a suitor or witness was held to extend only to an exemption from arrest, and did not extend to exemption from the service of a summons, either upon a party to a cause or a witness.

The exemption has been held only to apply to arrest and not to cover cases of service of process which does not interfere with or prevent the party's attendance upon the court. Baldwin v. Emerson, 16 R. I. 304; Capwell v. Sipe, 17 R. I. 475.

A suitor may be privileged from arrest on civil process, but is not privileged from service of nonbailable process. Hunter v. Cleveland, 1 Brev. 167; Hopkins v. Coburn, 1 Wend. 292; Sadler v. Ray, 5 Rich. L. 523; Legrand v. Bedinger, 4 T. B. Mon. 539.

The privilege only extends to the exemption of his person from arrest. Sadler v. Ray, *supra*.

It does not apply to a prisoner discharged from duress or imprisonment. Lynch's Case, 1 City Hall Rec. 138; Shotwell's Case, 4 City Hall Rec. 75.

And does not extend throughout the term at which the cause is marked for trial. Smythe v. Banks, 4 U. S. 4 Dall. 329, 1 L. ed. 854.

Nor is it an absolute freedom from arrest, such as belongs to the members of the royal family of England, or to ambassadors and some others. Smith v. Jones, 76 Me. 138, 49 Am. Rep. 596.

It is not a total exemption from arrest, such as is extended to persons discharged from arrest in bankruptcy or insolvency proceedings, or where the law forbids arrest for the collection of demands. *Ibid.*

It does not apply to a witness taken to a foreign state to answer a criminal charge, served with a summons while there. Scott v. Curtis, 27 Vt. 762; Com. v. Daniel, 4 Clark (Pa.) 49; Key v. Jetto, 1 Pittsb. 117; Byler v. Jones, 22 Mo. App. 623; Moore v. Green, 73 N. C. 394, 21 Am. Rep. 470; Williams v. Bacon, 10 Wend. 636; Addicks v. Bush, 1 Phila. 19.

In Lucas v. Albee, 1 Denio, 666, the court held the rule of privilege did not extend to a defendant, arrested on a capias in a civil action for an offense of which he had just been tried and convicted in the court of special sessions.

It has been held not to apply to the case of a suitor served with a writ of summons while attending court, such process not interfering with his attending nor obstructing the due administration of justice. Ellis v. De Garmo, 19 L. R. A. 560, 17 R. I. 715.

Nor to protect a witness from arrest for perjury committed in the cause wherein he had given evidence. *Ex parte* Levi, 28 Fed. Rep. 651.

The privilege extends at common law only so far as to discharge from arrest when arrested on civil process, and does not abate the suit. Christian v. Williams, 111 Mo. 429.

The privilege from arrest of parties and witnesses attending before the senate or house of representatives, or their committee, is the same as of those attending any strictly judicial tribunal. Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370.

The fact that a party is engaged in preparing to set aside a referee's report gives him no claim to exemption from arrest. Clark v. Grant, 2 Wend. 257.

Such act only grants immunity from arrest when the party is in attendance under due service of a subpœna. Massey v. Colville, 45 N. J. L. 119, 46 Am. Rep. 754.

The law permits civil suits to be commenced and prosecuted against persons who may be brought unwillingly into the state, where the creditor has nothing to do directly or indirectly with bringing such debtor within the jurisdiction of the court. Nichols v. Goodheart, 6 Ill. App. 574; Williams v. Bacon, 10 Wend. 636.

In Nichols v. Goodheart, *supra*, the defendant, brought within the state on a criminal process, was sued civilly, and it was held the evidence not showing that the plaintiff brought him within the jurisdiction, either directly or indirectly, that such suit was maintainable.

On every joint and several bond, where the actions are supported against two or more defendants, every individual is liable in his separate and distinct capacity, and the privilege or exemption from arrest which the law allows to one defendant will not prevent the ordinary course of justice against any of the other obligors, the privilege not being extended by implication, because a fellow debtor is entitled to legislative exemption from arrest. Gibbes v. Mitchell, 2 Bay (S. C.) 406.

In Greer v. Young, 120 Ill. 189, reversing Greer v. Youngs, 17 Ill. App. 106, the court held the privilege was not to be extended to a case of service by merely reading the document.

Such an action does not come within the reasons of the rule. Greer v. Young, *supra*.

IV. *Parties as witnesses.*

Nonresident parties have been held entitled to privilege from service of summons. Wilson Sewing Mach. Co. v. Wilson, 22 Fed. Rep. 803; Brooks v. Farwell, 4 Fed. Rep. 166; Parker v. Hotchkiss, 1 Wall. Jr. 269; Juneau Bank v. McSpedan, 5 Biss. 64; Small v. Montgomery, 23 Fed. Rep. 707; United States v. Bridgman, 9 Biss. 221; First Nat. Bank of St. Paul v. Ames, 39 Minn. 179; Gregg v. Sumner, 21 Ill. App. 110; Wilson v. Donaldson, 3 L. R. A. 268, 117 Ind. 356; Greer v. Young, 120 Ill. 189, reversing Greer v. Youngs, 17 Ill. App. 106; Jacobson v. Hosmer, 76 Mich. 234; Letherby v. Shaver, 73 Mich. 590; Mitchell v. Huron Circuit Judge, 53 Mich. 542; Torry v. Bast, 3 W. N. C. 63; Moletor v. Sinnen, 7 L. R. A. 817, 76 Wis. 308; Addicks v. Bush, 1 Phila. 19; Wetherill v. Seitzinger, 1 Miles (Pa.) 237; Waterman v. Merritt, 7 R. I. 345; Palmer v. Rown, 21 Neb. 452, 59 Am. Rep. 844; Halsey v. Stewart, 4 N. J. L. 366; Tribune Asso. v. Sleeman, 12 N. Y. Civ. Proc. Rep. 21; Matthews v. Tufts, 87 N. Y. 568; Murphy v.

another state he was exempt from civil process while attending as a witness in the short note case, and for a reasonable time thereafter. This motion was answered by Mullen, who insisted that it should be dismissed but the court below being of opinion that it was bound by the decision of this court in *Bolgiano's Case*, 73 Md. 132, passed an order quashing the writ of summons as prayed by Sanborn. From this order Mullen has appealed.

The only question, therefore, presented

Sweezy, 2 N. Y. Supp. 241; Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35; Dungan v. Miller, 37 N. J. L. 182; Holmes v. Nelson, 1 Phila. 217; Hayes v. Shields, 2 Yeates, 222; Kauffman v. Kennedy, 25 Fed. Rep. 785; Miles v. McCullough, 1 Binn. 77; Bridges v. Sheldon, 18 Blatchf. 507.

They have also been held exempt from arrest in civil actions. Compton v. Wilder, 40 Ohio St. 130; Page v. Randall, 6 Cal. 32; Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370; Com. v. Huggeford, 9 Pick. 257; Wood v. Neale, 5 Gray, 538; Case v. Rorabacher, 15 Mich. 537; Torry v. Bust, 3 W. N. C. 63; Addicks v. Bush, 1 Phila. 19; Wetherell v. Seitzinger, 1 Miles (Pa.) 237; Harris v. Grantham, 1 N. J. L. 142; Clark v. Grant, 2 Wend. 257; Snelling v. Watrous, 2 Paige, 314, 2 L. ed. 923; Murphy v. Sweezy, 2 N. Y. Supp. 241; Salhinger v. Adler, 2 Robt. 704; Ellis v. De Garmo, 19 L. R. A. 560, 17 R. I. 715; Dungan v. Miller, 37 N. J. L. 182; Tribune Asso. v. Sleeman, 12 N. Y. Civ. Proc. Rep. 21; Holmes v. Nelson, 1 Phila. 217; Hayes v. Shields, 2 Yeates, 222; Moletor v. Sinnen, 7 L. R. A. 817, 76 Wis. 308; Com. v. Daniel, 4 Clark (Pa.) 49; Pollard v. Union Pac. R. Co. 7 Abb. Pr. N. S. 70; *Ex parte* McNeil, 6 Mass. 245; Blight v. Fisher, 1 Pet. C. C. 41; Schlesinger v. Foxwell, 1 N. Y. City Ct. Rep. 461; Richards v. Goodson, 2 Va. Cas. 281; Taft v. Hoppin, Anthon, Nisi Prius 187.

But some courts have held that a nonresident plaintiff is not exempt from obeying any ordinary process of the court. Page v. Randall, *supra*; Bishop v. Vose, 27 Conn. 1.

A nonresident plaintiff is not exempt from service of a summons in another suit. Baldwin v. Emerson, 16 R. I. 304.

The reason being that such service amounts simply to a notice and does not obstruct the administration of justice, nor interfere with the attendance or attention of a party to the suit then on trial. Ellis v. De Garmo, 19 L. R. A. 560, 17 R. I. 715.

Where the plaintiff alleged that he was not a resident of San Francisco, in attendance as a suitor upon the board of the United States land commissioner, but did not allege that at the precise time of the summons he was in attendance upon any court as a witness, juror, or party, the court held that even if this had been so he would only have been exempted from arrest in a civil action, and not from obeying any ordinary process of the court. Page v. Randall, 6 Cal. 32.

Yet where a nonresident party plaintiff in a suit procured a writ of protection and attending under it on the trial, and until the case was committed to the jury, and when on his way home was served with a writ of summons, the action was dismissed for want of legal service. Waterman v. Merritt, 7 R. I. 345.

Where the defendant pleaded in abatement that he was privileged while attending court as a party defendant to another suit from service of a civil process, the court held that in general, exemption from service of process without arrest, merely because a party was attending court awaiting trial, was unauthorized by any settled rule of law and was not required by public policy. Case v. Rorabacher, 15 Mich. 537.

A mere nominal plaintiff without personal interest in the suit in attendance as such, is entitled to exemption from service of summons. Capwell v. Sipe, 17 R. I. 473.

In Moletor v. Sinnen, 7 L. R. A. 817, 76 Wis. 308, 25 L. R. A.

however, it was held that the weight of judicial opinion was in favor of the proposition that where a party in good faith is brought within the jurisdiction of a state, or detained therein, being a nonresident either as a party to a suit or as a witness in another suit, he is not subject to service.

The authorities hold that privilege from the service of summons has existed from time immemorial, and has been upheld by both the federal and state courts, and the rule of law announced by them with such unanimity ought not to be considered to have been abrogated by any implication from the language used in section 5459 of the Ohio Statute. Andrews v. Lembeck, 46 Ohio St. 38.

In Addicks v. Bush, 1 Phila. 19, the defendant was charged with criminal conspiracy, tried, and acquitted, and immediately afterwards served with writ. The court held there was no distinction of the privilege between that of arrest, and service of civil process.

In State v. Stewart, 60 Wis. 587, 50 Am. Rep. 388, however, where the relator was arrested in Indiana upon a requisition, and after being tried, acquitted, and discharged, was again arrested before he had time to return, it was held, there being arrangement between the states, that the second arrest was legal.

And in a case where the question was whether a person, charged with crime before a committing magistrate to discharge on his recognizance for a further hearing, was subject while returning from the office of the magistrate to arrest on civil process for debt, the court held that such a man did not come within any of the classes of persons exempted by law, while going to, attending on, or returning from judicial proceedings in which they were interested, he being neither a suitor, witness, juror, nor officer of the court. Key v. Jetto, 1 Pittsb. 117.

So where the defendant, charged with having obtained goods by false pretenses, arrested as a fugitive from justice in the state of Massachusetts, by virtue of a precept by the governor of that state, was again arrested on a *capias ad respondendum* in actions founded upon contract, it was held he was not within the rule of privilege. Williams v. Bacon, 10 Wend. 636.

Again where the plaintiff sought to set aside a verdict and judgment, upon the ground that the suit was brought and service perfected upon him while in attendance upon the court, by virtue of a state requisition for him as a fugitive from justice forced to return to answer the charge against him, to which he did not appear or plead, but it did not appear that he was in the state under any extradition in legal contemplation, his presence not being compelled, the court held he was there as a mere volunteer, and that if not in the state as a prisoner or under compulsion as a fugitive from justice, he was liable as others and must answer in like manner; and further that he did not avail himself of the privilege at the proper time, even if he were entitled to it. King v. Phillips, 70 Ga. 409.

In Brooks v. Farwell, 4 Fed. Rep. 166, the court stated that the authorities were clear to the point, that a party going into another state as a witness or as a party under process of a court, to attend upon the trial of a cause, was exempt from process in such state while necessarily attending in respect to such trial, following Parks v. Hotchkiss, and Juneau Bank v. McSpedan, 5 Biss. 64.

here, is whether, under the circumstances of this case, the appellee, Sanborn, is exempt from the service of summons issued to bring him into court to respond in damages for the wrongful and malicious issuing of the attachment. We do not think this case is within the rule laid down by this court in *Bolgiano's Case*, *supra*. That was the case of a witness, who was not a party to the suit, who came here from New Jersey, where he resided, for the purpose of testifying in a cause on trial in this state, and we there ex-

The rule was extended to the case of a nonresident defendant, indicted in the district court, who came to the state without arrest, under arrangement with the government for the purpose of being present at his trial, and pleading to the indictment and giving bail, served with summons in a civil action, his attendance being really compulsory, as if he had not come he could have been brought upon warrant, and for that reason he was necessarily within the jurisdiction. United States v. Bridgman, 9 Biss. 221.

Where a citizen of the state of Pennsylvania was extradited upon a criminal prosecution instituted in the state of Ohio, and upon his being brought into the latter state, was served with summons and arrested in a civil action, it was held he was entitled to privilege. Compton v. Wilder, 40 Ohio St. 130.

Where the defendant, immediately after the trial was served with a capias containing an *ac etiam* clause, and bail not being demanded indorsing his appearance, it was held that the defendant was privileged from arrest, but not from having process served upon him in that action, which was non-bailable. Hopkins v. Coburn, 1 Wend. 292.

The doctrine of privilege of nonresident witnesses and parties was upheld in Small v. Montgomery, 23 Fed. Rep. 707, where a nonresident defendant, a necessary witness on his own behalf, was served with a subpœna in another cause then pending in the circuit court, and while attending as a witness in the latter in obedience to the subpœna, was served with process to which he pleaded in abatement upon which plea the court gave judgment.

So in Parker v. Hotchkiss, 1 Wall. Jr. 269, the defendant, a nonresident served with summons on the day of the trial at his lodgings, was held privileged, the court overruling Blight v. Fisher, 1 Pet. C. C. 41.

The rule applies to a defendant, attending as a party and witness before an examiner in chancery in the circuit court in a suit, served with summons pursuant to section 287 of chapter 66 of the Minnesota General Statutes of 1878, requiring him to show cause why he should not be bound by the judgment in an action brought against the firm in which he was a partner. First Nat. Bank of St. Paul v. Ames, 39 Minn. 179.

To the case of one within the jurisdiction for the purpose of testifying on his own behalf under the advise of counsel, served with summons while the jury were considering the case and while he was still in the court-room. Gregg v. Sumner, 21 Ill. App. 110.

In Wilson v. Donaldson, 3 L. R. A. 266, 117 Ind. 356, a nonresident defendant in the state for the purpose of testifying, was held not legally served with a summons at the suit of the same plaintiff, the provisions of section 312 of the Indiana Revised Statutes of 1881, providing for service on a nonresident not applying to such a case.

Where the litigants, citizens of Tennessee, met in Georgia and each sued out bail process against the other, and the defendant was arrested in vacation, the court thought it but just that he might have the plaintiff arrested during the term, where he was in attendance as a suitor, but the court upon appeal held that, inasmuch as the law as it then stood made no such distinction, the exception must be grafted upon common-law principle by the legislature and not by the courts. Henegar v. Spangler, 29 Ga. 217.

Where a nonresident presented a claim against the commonwealth of Massachusetts to the legislature, and voluntarily appeared before a joint committee to prove the same, when he was arrested on an execution issued upon a judgment of that state against him, he was held privileged and discharged on writ of habeas corpus. Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370.

So where the petitioner, having a suit pending, obtained a writ of protection and was arrested while employed about his cause, which presented a question of law upon facts agreed, and it was not shown that it would not be put upon the law docket of the term, or that there would be no jury trials, it was held he could not be prejudiced by the circumstance that the term was a law term and was therefore entitled to be discharged upon habeas corpus. Com. v. Huggeford, 9 Pick. 257.

And where the petitioner, a foreigner, whose claim was specially assigned for examination, attended a hearing by commissioners appointed by a judge of probate to examine claims against an insolvent decedent's estate, which was begun and continued, was arrested on mesne process before the adjourned meeting, he was held privileged and discharged upon habeas corpus. Wood v. Neale, 5 Gray, 538.

Again where the relator was served with a summons while on his way home, without any deviation as to his journey, and with no delay that was not fully justified, the service was held a breach of privilege and an abuse of process and a mandamus was granted with costs against the plaintiff. Jacobson v. Hosmer, 76 Mich. 234.

And again where a nonresident plaintiff was served with a summons while attending court on a trial of his suit, as a party and a witness therein, and for no other purpose, it was held such service was void and might be set aside upon a motion to the court. Letherby v. Shaver, 73 Mich. 500.

So also where the relator, a nonresident, attending to business, was sued civilly and also arrested criminally, being let out on bail went in search of his attorney, but did not find him on that day, subsequently visited him in consultation when he was served with summons for the tort involved in the criminal complaint, the service was set aside upon mandamus as a breach of privilege. Jacobson v. Hosmer, *supra*.

Where the relator, a party to two suits in a foreign jurisdiction, examined as a witness in one of the causes, the other being continued, was served with summons in another suit while attending court for the sole purpose of giving evidence, and applied to the court to set aside the service which being refused he moved for a mandamus, the court held that the writ should issue as public policy, the due administration of justice and the protection to parties and witnesses alike demanded it. Mitchell v. Huron Circuit Judge, 53 Mich. 542.

A nonresident, attending upon a notice of his counsel the argument of a rule on which he was defendant, was served with summons while on his way back to his hotel, and was held privileged from arrest or service of summons. Torry v. Bast, 3 W. N. C. 63.

So where a nonresident defendant attended with a view of being present with his counsel at the taking of the depositions of a witness, under rule entered for that purpose, the court held that he was entitled to the privilege of a suitor, notwithstanding the cause was at that time under arbitration. Wetherill v. Seitzinger, 1 Miles (Pa.) 237.

In Com. v. Hambright, 4 Serg. & R. 149, the de-

pressed the view that the tendency of the courts in this country "is to enlarge the privilege and afford full protection to suitors and witnesses from all forms of process of a civil nature during their attendance before any judicial tribunal, and for a reasonable time in going and returning," but continuing, we said, "We think the decided weight of authority has extended the privilege so far, at least, as to exempt a resident of another state who comes into this state as a witness to give evidence in a cause here from service of pro-

---

fendant, taken on a *capias ad satisfaciendum* which was set aside, was afterwards arrested upon a *capias ad respondendum* and imprisoned, the court refused the rule to show cause why he should not be discharged,—held upon appeal that the court would not interfere with the decision of the court below upon the question of privilege.

The same doctrine was upheld by the court in Palmer v. Rowan, 21 Neb. 452, 59 Am. Rep. 844, where the defendants attended court in a suit in which the state was prosecuting and in which they were entitled to defend.

Where the defendant was arrested while attending the inferior court of another county, he was discharged from arrest upon motion. Harris v. Grantham, 1 N. J. L. 142.

A nonresident attending as a necessary party, who after the decision left the court-room, and while descending the steps of the court-house was met by the sheriff who read a summons to him when the defendant went directly to his counsel's office to consult him and was there served with a copy, was held entitled to a discharge. Halsey v. Stewart, 4 N. J. L. 366.

And a nonresident attending a reference as a party to the suit, was held entitled to the privilege from arrest. Clark v. Grant, 2 Wend. 257.

Where upon attachment against a defendant for non-answer to a complaint, he applied to the proper officer for his discharge under the insolvent act, and an examination was obtained and after its close and as he was leaving the office was arrested by an improper contrivance, he was discharged. Snelling v. Watrous, 2 Paige, 314, 2 L. ed. 923.

A nonresident present to answer a criminal charge, served with civil process while necessarily in the state waiting an examination, was held entitled to immunity from service or arrest. Murphy v. Sweezy, 2 N. Y. Supp. 241.

In the above case the defendant had given bail to appear at any time when called upon, and the case had been adjourned owing to the inability of the complainant to attend. *Ibid.*

A defendant present for the purpose of attending a meeting of creditors of a bankrupt, solely as a creditor and witness to prove his debt and claim against the estate, to participate in the choice of assignee and for no other purpose, served with process fifteen minutes after the adjournment of the meeting, was held privileged. Matthews v. Tufts, 87 N. Y. 568.

Where, before the court in which his action was pending commenced its session, having come for the purpose of attending either the trial of his cause or its removal upon the justification of sureties the defendant was arrested when leaving for home thinking nothing would be done, it was held he was entitled to go to ascertain if anything would be done as was expected, and to return unmolested, and that merely stopping to announce to opposing counsel that nothing would be done, was not a deviation, and was therefore entitled to be discharged on stipulating not to bring an action. Salhinger v. Adler, 2 Robt. 704.

So where the parties were attending court upon the hearing of an habeas corpus, which was dismissed and the parties had an interview, which the plaintiff pretended was for the purpose of an amicable settlement, but really for the purpose of detaining the defendant until such time as he could issue another writ, which was served during the interview, the court held the same an abuse of the process of the court and dismissed the writ. *Ex parte* Everts, 2 Disney (Ohio) 33.

And where the defendant served with an ordinary summons pleaded in abatement that he was a resident of another state, present for the purpose of defending an action pending against him, and testifying on his own behalf, which action being called on for trial he announced his readiness to proceed, but plaintiff dismissed the action and withdrew the papers from the file, but immediately afterwards refiled his complaint and caused defendant to be served with a new summons while on his way home, the court held the service illegal. Wilson v. Donaldson, 3 L. R. A. 266, 117 Ind. 356.

Again where a nonresident attended divorce proceedings, the hearing of which was adjourned owing to the wife's sickness, and remained in the state awaiting the assignment of the hearing, the court held that until such assignment under the facts, he was, and was required to be in attendance upon the court in the strict sense of the term, the case not being continued or definitely postponed, and being in order, he was liable to be called at any time when the petitioner could come into court, and that therefore his arrest on writ of assumpsit was a violation of his privilege as a party attending court. Ellis v. De Garmo, 19 L. R. A. 560, 17 R. I. 715.

In *Re* Kimball, 2 Ben. 38, a bankrupt was arrested while on his way to the register's office for the purpose of examination, it was held that he was not exempt from arrest under section 26 of the Bankrupt Act, but that the order was substantially a subpœna and he was to be considered as a witness, and that as such and as a party, he was entitled to protection and his discharge was ordered as a breach of privilege subject to the power to rearrest.

In *Ex parte* Kerney, 1 Atk. 55, the question was raised as to whether a man was liable to be rearrested while under the summons of commissioners of bankrupts, and the court considering it a question of great importance and finding no precedence of like cases, ordered the petition to stand over and a search to be made for such cases, and in the meantime advised the sheriffs to discharge the petitioner.

But in Parker v. Manco, 61 Hun, 519, the evidence was agreed to be taken before a notary public out of court, and the defendant who came into the state for that purpose was served with summons in a civil action by the same plaintiff. It was held that he was not entitled to the privilege, as the doctrine did not apply to cases where the testimony was taken out of court.

So in Finch v. Galligher, 12 N. Y. Supp. 427, 25 Abb. N. C. 404, the defendant, a nonresident, was served while attending court as a party and attorney in his own behalf, the proofs showing that he remained longer than was necessary after his determination to drop the examination by way of depositions, and the court held the privilege was lost by remaining within the state an unreasonable and unnecessary length of time, his presence having no real relation with the examination of witnesses, and was purely for his own pleasure and purely for ulterior objects.

So where the plaintiff, present under the advise of his attorney for the purpose of assisting him in the taking of depositions in support of his case, while in his attorney's office considering the depositions taken, was served with process by the sheriff reading the same, it was held he was not

cess for the commencement of a civil suit against him in this state, and that the privilege protects him in staying and returning, provided he acts bona fide, and without unreasonable delay."

The language above quoted was, of course, used in reference to the facts of the case then before us—that of a witness who was not a party to the cause. As we did not, in the case just cited, undertake to lay down any general rule as to the exemption of suitors from civil process, because that was a case

---

privileged and the service was good. Greer v. Young, 120 Ill. 139, reversing Greer v. Youngs, 17 Ill. App. 106.

The words "taken" "capias" and "arrest" do not comprehend the service of a process by which no imprisonment, no restraint of liberty, no bail is required, but only a notice or copy of the process. Legrand v. Bedinger, 4 T. B. Mon. 539.

The privilege from arrest, as established under the Vermont Statute, chapter 34, section 17, extends only to parties or witnesses in civil suits, and not to criminal proceedings, the words of the statute showing that it was intended to confine its provisions to the former class of cases its words are "any party or witness in any case pending before any court in this state, or before auditors, referees, etc." Scott v. Curtis, 27 Vt. 762.

A statute only extends to the witness's exemption when he is attending under the compulsion of a subpœna. Hardenbrook's Case, 8 Abb. Pr. 416.

Prior to the revised statutes, the exemption of voluntary witnesses' from arrest was confined to voluntary foreign witnesses.

A summons in a civil action is "process" within the meaning of the cases, although it is held not to be a process within the meaning of section 14 of article 6 of the Minnesota Constitution. Sherman v. Gundlach, 37 Minn. 118.

The suggestion that the North Carolina statutes, which in express terms exempt witnesses from arrest, had the effect by implication of abrogating the rule of the common law in regard to suitors, was held to have no force. Hammerskold v. Rose, 52 N. C. 629.

In Hammerskold v. Rose, *supra*, the court held that it saw no ground to support the position that the principles of the common law, by which the suitor while going to, remaining at, or returning from court was exempted from arrest, was in force in that state.

Section 5457 of the Revised Statutes of Ohio designates particularly the persons either absolutely or at certain times, privileged from arrest, and includes all suitors while going to, attending, or returning from court.

Section 5458 fixes the time and place which shall be free from the disturbance liable to follow from an arrest.

Section 5459 provides, nothing in this subdivision contained shall be construed to extend to cases of treason, felony, or breach of the peace, or to privilege any person herein specified from being served at any time with a summons or notice to appear, and all witnesses not contrary to the provisions herein contained, made in any place, or on any river or watercourse within or bounding upon the state, shall be deemed lawful.

In the construction of this statute, it is held that an indictable offense was included under the term "breach of peace." *Ex parte* Levi, 28 Fed. Rep. 651.

V. *Witnesses in general.*

A resident of another state or country who has in good faith come into a state as a witness to give evidence in a cause, is exempt from service with process for the commencement of a civil action against him. Sherman v. Gundlach, 37 Minn. 118; Bishop v. Vose, 27 Conn. 1; Moletor v. Sinnen, 7 L. R. A. 817, 78 Wis. 308; Schlesinger v. Foxwell, 1 N. Y. City Ct. Rep. 461; Jenkins v. Smith, 57 How. Pr. 171; Matthews v. Tufts, 87 N. Y. 568; Pope v. Negus, 3 N. Y. Supp. 796; Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35; Brown v. Sleeman, 12 N. Y. Civ. Proc. Rep. 20; Hopkins v. Coburn, 1 Wend. 292; Hollender v. Hall, 58 Hun, 604, 13 N. Y. Supp. 759, 33 N. Y. S. R. 843; Snelling v. Watrous, 2 Paige, 314, 2 L. ed. 923; Lamkin v. Starkey, 7 Hun, 479; Thorp v. Adams, 58 Hun, 603, 11 N. Y. Supp. 41; Sheehan v. Bradford, R. & K. R. Co. 3 N. Y. Supp. 790; Wilbur v. Boyer, 1 W. N. C. 154; Atchison v. Morris, 11 Biss. 191; Bridges v. Sheldon, 13 Blatchf. 507; Brooks v. Farwell, 4 Fed. Rep. 109; Parker v. Hotchkiss, 1 Wall. Jr. 269; Juneau Bank v. McSpedan, 5 Biss. 64; Small v. Montgomery, 23 Fed. Rep. 707; First Nat. Bank of St. Paul v. Ames, 39 Minn. 179; Gregg v. Sumner, 21 Ill. App. 110; Wilson v. Donaldson, 3 L. R. A. 266, 117 Ind. 356; Palmer v. Rowan, 21 Neb. 452, 59 Am. Rep. 844; Dungan v. Miller, 37 N. J. L. 182; Brett v. Brown, 13 Abb. Pr. N. S. 295; Capwell v. Sipe, 17 R. I. 475; Kauffman v. Kennedy, 25 Fed. Rep. 785; Baldwin v. Emerson, 16 R. I. 304; Saever v. Robinson, 3 Duer, 622; Bolgiano v. Gilbert Lock Co. 73 Md. 132; Pollard v. Union Pac. R. Co. 7 Abb. Pr. N. S. 70.

He is also privileged from arrest. Christian v. Williams, 111 Mo. 429; Sanford v. Chase, 3 Cow. 381; Mackay v. Lewis, 7 Hun, 83; Schlesinger v. Foxwell, 1 N. Y. City Ct. Rep. 461; Jones v. Knauss, 31 N. J. Eq. 211; Norris v. Beach, 2 Johns. 294; Hollender v. Hall, 58 Hun, 604, 13 N. Y. Supp. 759, 33 N. Y. S. R. 843; Farmer v. Robbins, 47 How. Pr. 415; Dixon v. Ely, 4 Edw. Ch. 557, 6 L. ed. 973; Snelling v. Watrous, 2 Paige, 314, 2 L. ed. 923; Lamkin v. Starkey, 7 Hun, 479; Vincent v. Watson, 1 Rich. L. 194; Martin v. Ramsey, 7 Humph. 260; Moore v. Chapman, 3 Hen. & M. 260; Washburn v. Phelps, 24 Vt. 506; Hurst's Case, 4 U. S. 4 Dall. 387, 1 L. ed. 878; Smith v. Jones, 76 Me. 138, 49 Am. Rep. 598; Pollard v. Union Pac. R. Co. 7 Abb. Pr. N. S. 70; Blight v. Fisher, 1 Pet. C. C. 41; Massey v. Colville, 45 N. J. L. 119, 46 Am. Rep. 754.

But where witnesses had given testimony before the grand jury and were discharged and were arrested on a warrant charging them with perjury, it was held they were not protected from arrest on such criminal charge, it being an indictable offense. *Ex parte* Levi, 28 Fed. Rep. 651.

In Flechter v. Franko, 15 N. Y. Supp. 674, the court upheld the doctrine as applied to nonresident witnesses, although in that case the party was a resident of the state.

The fact that the witness was not influenced makes no difference. Atchison v. Morris, 11 Biss. 191.

The rule is especially applicable in all its force to suitors and witnesses from foreign states attending upon the courts of this state. Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35.

An arrest should not be valid, even for the purpose of giving jurisdiction to the court out of which the process issues, especially where the witness is attending from a foreign state. Sanford v. Chase, 3 Cow. 381.

It is no answer to the claim of privilege of a nonresident witness, that he was not served with compulsory process after his arrival within the jurisdiction. Brett v. Brown, 13 Abb. Pr. N. S. 295.

In Pollard v. Union Pac. R. Co. 7 Abb. Pr. N. S. 70, the court held that the mere service of a summons without arrest, in a cause other than the one in which the party was attending court, would not be set aside on the ground of privilege.

Since the revised statutes, the privilege from arrest has been confined to witnesses attending court

involving only the rights of a witness, we do not think the case now before us would justify us in announcing a rule of exemption applicable alike to all suitors in all civil actions. As to what the better rule may be, both as to plaintiff and defendants, there is some conflict of authority; but we are of opinion that this right of exemption should not be extended to one who, like the appellee, comes here and avails himself of the right given him by our statute to issue an attachment for fraud, or, as it is generally

after being subpœnaed. Pollard v. Union Pac. R. Co. *supra*.

In Finch v. Gallagher, *supra*, the court stated that it was not prepared to follow in all particulars the doctrine of Greer v. Young, 120 Ill. 184.

Where a witness was arrested while returning home from a criminal trial in which he had given evidence, it was held in an action of trespass brought by him against the sheriff, that the action could not succeed, except it were granted by a legislative power. Carle v. Delesdernier, 13 Me. 363, 29 Am. Dec. 508.

In Smith v. Jones, 76 Me. 138, 49 Am. Rep. 598, the plaintiff sued defendant for causing his arrest upon civil process while returning as a witness from court; the court refused to entertain the action, as the nature and extent of the privilege from arrest accorded by law to a witness was not a natural right and was contrary to common right, the plaintiff's arrest being pursuant to a general right in the same manner as any other debtor could have been, the claim being suable the court having jurisdiction.

In Jones v. Knauss, 31 N. J. Eq. 211, the defendant was arrested on a *ca. sa.* while in attendance as a voluntary foreign witness. It was held that his arrest was illegal, the court distinguishing the case from that of Rogers v. Bullock, 3 N. J. L. 109, upon the ground that in the latter case the witness was a citizen of the state and as such amenable to the process of its courts, and that if it were otherwise the fact was too important to have escaped mention by the reporter, a member of the court deciding the case.

The courts will not take jurisdiction of a party whose rights are thus invaded, as to do so would be to withdraw the shield and protection uniformly given by the law to witnesses. Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35.

Where the defendant, a nonresident, was present to testify in two separate courts on the same day, and the cases were adjourned of which fact he had not personal knowledge and his attendance was not required during the day, upon his being served with process on the same day, it was held he was entitled to the privilege, the court stating that his remaining within the jurisdiction during the time the court was in session and up to the time of its usual adjournment, was not such an unreasonable delay as to prevent his claiming the privilege of exemption. Pope v. Negus, 3 N. Y. Supp. 796.

The defendant, a nonresident subpœnaed to attend before arbitrators, was arrested by virtue of a *capias ad respondendum*, and was ordered discharged absolutely without being required to find bail. Sanford v. Chase, 3 Cow. 381.

So where a nonresident was attending court at the request of the executor and devisee of a will, for the purpose of proving it, to which will he was a witness, was arrested after he had given his testimony and was proceeding home, he was discharged. Norris v. Beach, 2 Johns. 294.

And where the defendant, a resident of Nicaragua, having foreign residence there, but retaining his status as a citizen of the state of New York, was in that state for the purpose of testifying in an action in the federal court, his evidence being taken before a notary public, it was held the doctrine of privilege from service of summons extended to the case where the testimony was taken by consent in that form. Hollender v. Hall, 58 Hun, 604, 13 N. Y. Supp. 759, 33 N. Y. S. R. 848.

But where a witness attended the trial upon subpœna, and afterwards at the request of counsel, the court held that the last attendance was not privileged, being voluntary. Hardenbrook's Case, 8 Abb. Pr. 416.

Section 860 of the New York Code of Civil Procedure, Bliss' ed. vol. 1, p. 722, provides a person duly and in good faith subpœnaed and ordered to attend for the purpose of being examined in a case where his attendance may lawfully be enforced by attachment or by commitment, is privileged from arrest in a civil action or special proceeding while going to, remaining at, or returning from the place where he is required to attend.

By section 54 of 2 New York Revised Statutes, 419, it is provided that every arrest of a witness made contrary to the foregoing provisions shall be absolutely void and shall be deemed a contempt of the court issuing the subpœna. Farmer v. Robbins, 47 How. Pr. 415.

A defendant exempt by reason of his attendance before a referee upon a subpœna, arrested when about to return home without unnecessary delay or deviation from the proper route, was held privileged. Farmer v. Robbins, 47 How. Pr. 415.

If his attendance is in good faith, service of summons is irregular. Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35.

And even though not subpœnaed after his arrival, he cannot be taken on a writ of *ne exeat* while waiting to give evidence. Dixon v. Ely, 4 Edw. Ch. 557, 6 L. ed. 973.

An attachment for the nonpayment of costs only, although criminal in form, in substance is civil, and a party will be entitled to the like protection from arrest thereon, as in other civil process during his attendance as a party or witness, and a reasonable time to go and return. Spelling v. Watrous, 2 Paige, 314, 2 L. ed. 923.

In Lamkin v. Starkey, 7 Hun, 479, it was held that the court had power independently of statute to protect its suitors, officers, and witnesses, protection being afforded for the sake of public justice.

Matthews v. Tufts, 87 N. Y. 568, was followed and approved of in Thorp v. Adams, 58 Hun, 603, 11 N. Y. Supp. 41, where the defendant came to testify before a legislative committee, such committee not sitting for some few days after his arrival, the summons being served upon him while coming from the committee rooms.

If attending in good faith either with or without a writ of protection, they are privileged from arrest on civil process and this immunity extends to all kinds of civil process and affords an absolute protection to set aside the service as illegal. Schlesinger v. Foxwell, 1 N. Y. City Ct. Rep. 461.

Where service was made upon one of the directors of a foreign railroad and a resident of a foreign state, attending before a referee at the request of one of the parties, such service was set aside on motion. Sheehan v. Bradford, R. & K. R. Co. 3 N. Y. Supp. 790.

Under section 2071 of the General Statutes of South Carolina all witnesses are exempted from service of all process going to, and remaining, and returning from court to which they have been subpœnaed or bound, except upon criminal charges of treason, felony, or breach of the peace.

called, an attachment on original process. This proceeding has always been considered an extrinsic remedy, and the legislature seeing the great temptation there would exist to abuse it, and the loss and injury to the defendant which must necessarily follow such abuse, provided by statute that no such attachment should issue until the plaintiff therein should give bond with good security to answer for all such costs and damages as should be awarded against him for wrongfully suing out such an attachment.

In Martin v. Ramsey, 7 Humph. 280, it was held that the process of subpœna to answer in chancery executed in that case upon witness was within the act.

The Tennessee Act of 1794, chapter 1, section 34, provides for the exemption from service of any writ, warrant, order, judgment, or decree, except witness summons during the attendance of any person, summoned as a witness to any court whatsoever, and during the time that such person is going to and returning from the place of such attendance, allowing one day for every twenty-five miles such witness has to travel to and from his place of residence.

In Moore v. Chapman, 3 Hen. & M. 260, a witness attending court under subpœna was arrested under an execution and brought action for assault and battery, and false imprisonment. The court held such action would not lie, even though the debt in the prior action had been paid.

In Hurst's Case, 4 U. S. 4 Dall. 387, 1 L. ed. 878, it was held that a citizen of another state in attendance on court as a suitor, subpœnaed as a witness in another case, was privileged from an arrest in execution issued from a state court while at his lodgings.

Upon a motion to set aside the service of a summons upon the ground that the defendant was a state's witness in attendance upon a congressional committee under subpœna, the court held that the privilege of a witness before congress, or before any of its committees, stood on the same footing as the privilege of the members of that body, and did not extend to freedom from the service of a simple summons but only from arrest. Wilder v. Welsh, 1 McArth. 566.

Where a motion was made to be discharged from arrest, on the ground that he was attending the trial of a cause in a county court as a witness without a subpœna, the court held that under the New Jersey statutes, a witness to be entitled to protection from arrest must be necessarily attending court, or going to or from it under a subpœna "previously and duly executed." Rogers v. Bullock, 3 N. J. L. 109.

In Dungan v. Miller, 37 N. J. L. 182, the court referred to the opinion in Rogers v. Bullock, *supra*, and held that it did not apply to the case of a nonresident.

In Massey v. Colville, 45 N. J. L. 119, 46 Am. Rep. 754, the privilege conferred upon witnesses by "an act concerning evidence" was said to be that every witness should be privileged from arrest in all civil actions, and no other during his necessary attendance, where his attendance should have been required by subpœna previously and duly served, and in coming to and returning from the same, allowing one day for every thirty miles from his place of business.

The South Carolina Act of 1791, 7 Stat. at L. 265, section 15, which provides all persons necessarily going to, attending on, or returning from the same, (referring to the superior courts) and shall be freed from arrest in any civil action, was held not to protect a party served with a *capias ad respondendum*. Huntington v. Shultz, Harp. L. 452, 18 Am. Dec. 680.

The scope and object of the South Carolina act was held to require no more than that the person of the party attending the court should be free from detention, and that therefore he might be cited or summoned without any detention of his person. *Ibid.*

25 L. R. A.

VI. *The effect of fraud and deceit.*

A valid and lawful act cannot be accomplished by any unlawful means, and whenever such unlawful means are resorted to the law will interpose and afford some suitable remedy, according to the nature of the case, to restore the party injured by such unlawful means to his rights. Byler v. Jones, 22 Mo. App. 623; Ilsley v. Nichols, 12 Pick. 270, 22 Am. Dec. 425.

The law will not lend its sanction or support to an act otherwise lawful which is accomplished by unlawful means. Chubbuck v. Cleveland, 37 Minn. 466; Townsend v. Smith, 47 Wis. 623, 32 Am. Rep. 793; Ilsley v. Nichols, 12 Pick. 270, 22 Am. Dec. 425; Sherman v. Gundlach, 37 Minn. 118; Williams v. Reed, 29 N. J. L. 385.

It is undoubtedly the law that where a debtor has been fraudulently induced to come within the jurisdiction of the court, so that he may be served or arrested under civil process, he is entitled to privilege. Nichols v. Goodheart, 5 Ill. App. 574. Snelling v. Watrous, 2 Paige, 314, 2 L. ed. 923, to the same effect.

An inhabitant of another state has a right to have his controversies settled by the courts in his own government, and must not be drawn into another state under ostensible protection of the court, and then be exposed to an entanglement and litigation. *Ex parte* Hall, 1 Tyler (Vt.) 274.

Courts of record will not tolerate service of process on any person, who for that purpose has been deceitfully brought within their jurisdiction, and they will protect from arrest *eundo et redeundo* not only parties, but also witnesses, who in obedience to its process, or in furtherance of its proceedings, appear within its jurisdiction. Slade v. Joseph, 5 Daly, 187.

In Van Horn v. Great Western Mfg. Co., 37 Kan. 523, the defendants moved to set aside a summons and the service thereof, upon the grounds *inter alia* that the service was procured by fraud or trick, by means of which they were brought within the jurisdiction of the court, and the court held that such a process was an abuse and could not be tolerated in any court of justice, and entertained the motion. To the same effect, Dunlap v. Cody, 31 Iowa, 250, 7 Am. Rep. 129; Goupil v. Simonson, 3 Abb. Pr. 474; Baker v. Wales, 14 Abb. Pr. N. S. 331; Wood v. Wood, 78 Ky. 624; Steele v. Bates, 2 Ala. 338, 16 Am. Dec. 720; Wanzer v. Bright, 52 Ill. 35; Townsend v. Smith, 47 Wis. 623, 32 Am. Rep. 793; Allen v. Miller, 11 Ohio St. 374; Hevener v. Heist, 9 Phila. 274; Williams v. Reed, 29 N. J. L. 385; Metcalf v. Clark, 41 Barb. 45; Brenner v. Ealy, 23 Kan. 123; Snelling v. Watrous, 2 Paige, 314, 2 L. ed. 923.

Where the party is induced by fraud, or compelled by criminal process, to enter within the boundaries of a county other than that of his residence, he is privileged. Christian v. Williams, 111 Mo. 429; Legrave's Case, 14 Abb. Pr. N. S. 333, in *note*.

No court will take jurisdiction of a party where it is obtained by fraud. Wanzer v. Bright, 52 Ill. 42.

The same conclusion was arrived at in the case of Capitol City Bank v. Knox, 47 Mo. 394; Martin v. Woodhall, 24 Jones & S. 429; Chubbuck v. Cleveland, 37 Minn. 466.

The privilege is confined to parties in civil proceedings, unless it appears that his apprehension of the criminal charge was a contrivance by the

When the appellee issued the attachment, the wrongful issuing of which and the damages thereby caused being the causes of action in this case, he gave bond as required by law, and the appellant not only has the right to look to that bond for compensation for the injury done him by the appellee, but in most cases it is the only source from which he may hope to secure it. We have held, however, that the bond cannot be put in suit, unless a suit against the plaintiff in the attachment for wrongfully suing it out

---

plaintiff to get him into custody on the civil suit. Com. v. Daniel, 4 Clark (Pa.) 49; Addicks v. Bush, 1 Phila. 19.

In order to sustain the objection that the defendant was brought by criminal proceedings, and against his will, within the civil jurisdiction of the court, two things must be established: first, that the criminal proceedings were instigated by a creditor or person attempting to subject him to the civil jurisdiction, and second, that such creditor or person was guilty of a wrongful act in the instigation of the criminal proceedings. Martin v. Woodhall, 24 Jones & S. 439.

Where the plaintiff in procuring the arrest of the defendant acted maliciously and without probable cause, his acts were wrongful and unlawful, and the service of a summons upon such defendant obtained by means of such act were not upheld. Byler v. Jones, 22 Mo. App. 623.

If a man voluntarily leaves his residence and goes to another county, or if seized when properly chargeable with crime and taken to another county, he may be said to be found there within the sense of the word as used in the Illinois statutes, but it is a base and utter perversion of the object of the law to permit an arrest under false and fraudulent pretense, and the abduction of a man for the sole purpose of obtaining service in a civil proceeding. McNab v. Bennett, 66 Ill. 157.

In Vastine v. Bast, 41 Mo. 493, the plaintiff, a resident of Illinois, sought to set aside a judgment rendered against him in the Missouri courts, upon the ground that jurisdiction was obtained by a false and fraudulent design in the service of the process in order to bring him within the jurisdiction of the court; the court held that the objection should have been taken by appearing in the original suit by way of motion to set it aside upon the ground of fraud.

Where a nonresident was decoyed into the state for the purposes of suit upon which his body was attached, the court ordered him discharged upon habeas corpus. Hill v. Goodrich, 32 Conn. 588.

Where a relator was arrested in the county of which he was a resident, on a criminal warrant from another county, and his examination was postponed upon his giving bail when he was arrested on a civil capias from the circuit court of the latter county, and also gave bail and moved to set the proceedings aside, it was held that such arrest was illegal, pending his release on bail on the criminal charge. Baldwin v. Branch Circuit Judge, 48 Mich. 525.

Where the evidence showed that the plaintiff arrested the defendant, and thereby caused him to be brought within the jurisdiction of the plaintiff's court, where he was then served with summons, the court held that if he was induced there by false representations for the purpose of being served with summons, such process was an abuse of legal process, and the court upon proof would set aside the service. Byler v. Jones, 22 Mo. App. 623.

Where the defendant was arrested on criminal process for the purpose of coercing him into a compromise of the plaintiff's demand for money, alleged to have been obtained by false pretenses, and was detained in custody until an order for his arrest in a civil action could be obtained, the court held it an abuse of the process of the law. Benninghoff v. Oswell, 37 How. Pr. 235.

With reference to the language "served at any time with a summons or notice to appear" as used in section 5459 of the statute, and "may be summoned" as used in section 5031 of the same statute, is to be held to contemplate such a service of summons as, according to the course of proceedings at the common law, where capias corresponded in its use to a summons, was free from the objection that it is either inactive fraud of the law or tended to impede or embarrass the administration of public justice, by deterring suitors from freely attending all proceedings which concern them or require their presence, the language contemplating such service as by well-recognized principles constitute good service. Andrews v. Lembeck, 46 Ohio St. 38.

With reference to the provisions of the above statute, it was held that the general assembly neither intended nor attempted to comprehend within the purview of these enactment cases, where service of a summons was procured and made in fraud of the law, or cases where the tendency was to impede or embarrass the free and complete administration of justice in courts of law. *Ibid.*

In United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, the defendant was charged with murder on the high seas and delivered up by the foreign authorities to the United States for trial upon that charge, upon which he was not prosecuted, but a minor offense, not included in the treaty by extradition was preferred against him, and the court held that he could not lawfully be tried for any offense other than that of murder, and that the treaty, the act of congress and the proceeding by which he was extradited, clothed him with the right to exemption from trial for any other offense until he had an opportunity to return to the country from which he was taken, a national honor requiring good faith to be kept with the country concerning him.

VII. *Enforcement of the privilege.*

He may procure his writ of protection in advance of starting for or from the court, if circumstances make it reasonable to ask the court's mediation for such protection. Smith v. Jones, 76 Me. 138, 40 Am. Rep. 598.

Such writ always receives a liberal construction in favor of the witness covered by it. *Ex parte* Hall, 1 Tyler (Vt.) 274.

Every privileged person, however, must at a proper time, and in a proper manner, claim the benefit of his privilege. Gyer v. Irwin, 4 U. S. 4 Dall. 187, 1 L. ed. 762.

The usual course is to appear in the cause for which the arrest was made and procure a rule against the plaintiff and his attorney, to show cause why the defendant should not be discharged out of custody by reason of his alleged privilege upon his filing common bail, the rule being supported by affidavit setting up the fact of arrest and the attending circumstances. Greer v. Young, 120 Ill. 189, reversing Greer v. Youngs, 17 Ill. App. 106.

It was formerly necessary to plead specially the privilege from arrest, but modern practice gives relief on motion. Vincent v. Watson, 1 Rich. L. 194.

The process can only be avoided by applying to the court for a discharge. Smith v. Jones, 76 Me. 138, 40 Am. Rep. 598; Lyell v. Goodwin, 4 McLean, 29; Ellis v. De Garmo, 19 L. R. A. 580, 17 R. I. 715.

It does not dismiss the suit which may stand as though commenced by summons. Ellis v. De Garmo, *supra*.

In such a case the service will be stricken out. Juneau Bank v. McSpedan, 5 Biss. 64.

has first been prosecuted to judgment. *McLuckie* v. *Williams*, 68 Md. 265. The appellee having failed to prosecute his attachment with success, and the appellant having sued him in the court where the bond was filed to ascertain the damages so that he could avail himself of a suit on the bond to make himself whole we think the appellee should be held to have waived his right, if he had any, to exemption from summons, and should at least be put in the same and no worse situation than resident suitors would be under

---

The applicant must show that he is a nonresident. Matthews v. Puffer, 10 Fed. Rep. 606.

The privilege may also be taken advantage of by plea in abatement. King v. Coit, 4 Day, 129; Gregg v. Sumner, 21 Ill. App. 110.

Such plea must be filed in apt time, that is, at the earliest practicable moment. Holloway v. Freeman, 22 Ill. 197; Union Nat. Bank of Chicago v. First Nat. Bank of Centreville, 90 Ill. 56.

It was held the proper remedy in McNab v. Bennett, 66 Ill. 157, where defendant was arrested upon a false complaint and taken by force to another jurisdiction for the purpose of being sued civilly.

In order to preserve his right to move to discharge the arrest, the attorney should appear specially, notice of retainer generally being an appearance in the cause. Stewart v. Howard, 15 Barb. 26.

He should plead his privilege in abatement of the action, or in bar of an execution against his body. Wood v. Kinsman, 5 Vt. 588.

Prior to the passing of the Vermont statute, a mere privilege from arrest could not be pleaded in abatement. Washburn v. Phelps, 24 Vt. 506.

So he may sue out a habeas corpus. Smith v. Jones, 76 Me. 138, 49 Am. Rep. 598; Wood v. Neale, 5 Gray, 538; Com. v. Huggeford, 9 Pick. 257; Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370; *Ex parte* McNeil, 6 Mass. 245.

There is no question about the issuing of the writ where the suit was commenced by arrest, and the reasons for exemption are applicable, though with less force in other cases. Mitchell v. Huron Circuit Judge, 53 Mich. 542.

So the proceedings will be set aside upon mandamus. Jacobson v. Hosmer, 76 Mich. 234; Mitchell v. Huron Circuit Judge, 53 Mich. 542.

In Grover v. Green, 1 Cal. 115, the court held that a person arrested while attending a reference under an order of the court would not be discharged upon motion if there was no notice of applying, but the court would only grant a rule to show cause.

Either the court, whose proceedings, having been interrupted by the arrest of a witness or the court in whose process the arrest is made, may interfere for the discharge. Vincent v. Watson, 1 Rich. L. 194.

The general practice is to apply to the court on whom the contempt has been committed, for redress. United States v. Edme, 9 Serg. & R. 142; Kinsman v. Reiner, 2 Miles (Pa.) 200.

The court in which the party is a suitor or witness is the proper one to apply for the discharge. Com. v. Daniel, 4 Clark (Pa.) 49.

Such court has the power conferred upon it in order that its business may not be interrupted or its dignity impaired. *Ibid.*

The court from which the process issued may discharge, but would act upon a different principle, namely, for an abuse of its process and not for contempt. *Ibid.*

VIII. *The question of waiver.*

The presumption is that every person within the territorial jurisdiction of a justice of the peace is subject to his jurisdiction for the service of process, and the party claiming an exemption must overcome the presumption by affirmative proof. Day v. Harris, 59 Hun, 623, 37 N. Y. S. R. 322, 14 N. Y. Supp. 3.

A waiver and voluntary submission are to be presumed, where there are no allegations to the contrary. Brown v. Getchell, 11 Mass. 11.

The exemption from arrest is a mere personal privilege which can be waived. Hardenbrook's Case, 8 Abb. Pr. 416.

While the privilege continues the person is sacred, but no longer. Petrie v. Fitzgerald, 1 Daly, 401.

The privilege may be waived and therefore the arrest is not void but voidable, and remains valid until avoided. Smith v. Jones, 76 Me. 138, 49 Am. Rep. 598.

By not taking steps the privilege is waived. *Ibid.*

No application to set aside process or proceedings for irregularity will be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step with a knowledge of the irregularity complained of, and the rule applies as well to the case of a prisoner as to other persons. Green v. Bonaffon, 2 Miles (Pa.) 219.

In general the party will waive his privilege unless he applies for a discharge upon motion, or on habeas corpus. Smith v. Jones, *supra*; Fletcher v. Baxter, 2 Aik. 224.

The privilege must be taken advantage of at the proper time or it will be waived. King v. Phillips, 70 Ga. 409.

Upon the first opportunity, otherwise his neglect will be deemed a waiver. Wood v. Kinsman, 5 Vt. 588.

The privilege fails unless claimed at once. Petrie v. Fitzgerald, 1 Daly, 401; Fletcher v. Baxter, 2 Aik. 224; Pollard v. Union Pac. R. Co. 7 Abb. Pr. N. S. 70.

Unless it be promptly taken. Matthews v. Puffer, 10 Fed. Rep. 606.

It must be insisted upon. Tipton v. Harris, Peck (Tenn.) 414.

A party privileged from arrest must take advantage thereof before pleaded in bar, as such plea admits that he is in court by proper process. Randall v. Crandall, 6 Hill, 342.

The giving of bail is no waiver of privilege. Mackay v. Lewis, 7 Hun, 83; Learned v. Griffin, 13 Fed. Rep. 590; United States v. Edme, 9 Serg. & R. 141; Washburn v. Phelps, 24 Vt. 506.

An appearance by an answer which simply protests against the exercise of jurisdiction and claims no other right is not such an appearance as waives the objection. Chubbuck v. Cleveland, 37 Minn. 456.

Where the defendant came into the jurisdiction with a bona fide intention of taking depositions, and upon sufficient justification changed his purpose, such alteration of purpose was held not to be a waiver of his privilege. Wetherill v. Seitzinger, 1 Miles (Pa.) 237.

So where the defendant came within the jurisdiction for the purpose of testifying before a legislative committee which did not sit for some few days. Thorp v. Adams, 58 Hun, 603, 11 N. Y. Supp. 41.

In Brett v. Brown, 13 Abb. Pr. N. S. 235, the question was whether the defendant had appeared generally and thereby waived his exemption, his affidavit relating to his attendance as a witness, the service of the summons upon him while so attending, and the order to show cause predicated of that paper, and related also to such attendance and service and asking the summons to be set aside, the court held the indorsement of the papers "attor-

like circumstances. Having voluntarily appeared in our courts to take advantage of this peculiarly harsh remedy; and having given bond, without which he could not have attached, he ought not to be allowed to assume a position which might enable him to escape all liability for his wrong doing, and at the same time destroy the efficacy of his bond. For, if the bond which in many cases will alone protect the defendant from loss and his business from destruction, cannot be put in suit until the nonresident plaintiff on attach-

neys for defendant" must be shown in connection with the proceeding initiated, of which it was a part, and that the extension of the time to answer was a precautionary step founded upon the possible denial of the motion, and that the appearance could not be enlarged into a waiver of the privilege, especially as the claim relating thereto was assented to at the same time that the quasi appearance was made.

If he waives the privilege and submits himself in the custody of the officer, he cannot afterwards object to the imprisonment as unlawful or as made by a void authority. Brown v. Getchell, 11 Mass. 11.

Where the defendant is given bail and justified, he waives his privilege. Petrie v. Fitzgerald, 1 Daly, 401.

So his silence is a waiver. Farmer v. Robbins, 47 How. Pr. 415.

And the demand of a copy of the demand and notice of retainer have been held waivers. Stewart v. Howard, 15 Barb. 26.

Where, at the time of the arrest, the defendant was actually under examination as a witness in a case before a commissioner under subpœna, it was held that by putting in bail he waived his privilege. *Ibid.*

An appearance is a waiver when general. Williams v. McGrade, 13 Minn. 174; Brett v. Brown, 13 Abb. Pr. N. S. 295.

So is the doing of some act in the cause in reference to his appearance or defense. Petrie v. Fitzgerald, 1 Daly, 401.

The giving of a bond for the prison bounds is a waiver of such privilege. Tipton v. Harris, Peck (Tenn.) 414.

And where the irregularities are known the obtaining of a rule to show cause there is a waiver. Green v. Bonaffon, 2 Miles (Pa.) 219.

It will be waived if judgment is suffered to pass without claiming the privilege, and by giving bail. Fletcher v. Baxter, 2 Aik. 224.

Where the principal not only gave bail but suffered judgment to pass against him in the original suit, without claiming or setting up his privilege, it was held he committed a waiver and there was no defense to an action against the bail. *Ibid.*

In Atchison v. Morris, 11 Fed. Rep. 582, the privilege was extended to a nonresident witness in the circuit court, from service of the summons in a civil action in the state court. The fact that the defendant so served, moved the court by petition and bond under the act of congress to remove the cause to the federal court, was held not to be a waiver of privilege, nor of the objection to service in the circuit court.

Where an answer to the motion asserted that the defendant did not claim his privilege as a witness, and that the sheriff did not know or suspect thereof, and that the defendant gave bail without objection, the sheriff discharging him out of custody, and subsequent notice of retainer by defendant's attorneys and demand of copy of complaint, it was held the privilege was waived, as had the defendant claimed his privilege the officer had power to discharge him out of custody; and for the further reason that notice given by his attorneys of retainer in the cause, and demanding copy of complaint, was a further waiver. Stewart v. Howard, 15 Barb. 26.

Where the defendant failed to claim his personal privilege to the sheriff, and to demand the same from the county judge who issued the order but acquiesced in the arrest by his silence, and entered into the usual undertaking, and then waited twenty-one days before serving the motion papers for his discharge, it was held the defendant waived his personal privilege and acquiesced in the arrest. Farmer v. Robbins, 47 How. Pr. 415.

Where the defendant, a resident of Kansas, attended as a witness but the case not being tried, claimed his privilege for the reason that the new circuit commenced in the following February and that it would be more convenient and less expensive for him to stay over until then than to return home; upon arrest in another action and giving bail, the court held he could not claim the privilege as it did not appear that he was not at perfect liberty to return since the fifteenth of December. Shults v. Andrews, 54 How. Pr. 380.

Where the defendant obtained a rule to show cause of action, and why he should not be discharged on common bail, in which the court reduced the bail, and afterwards he obtained a rule to show cause why the writ and service should not be quashed, upon the ground that the defendant was a suitor in the case pending, the court held that the writ and service could not be quashed, the defendant having obtained a rule to show cause of action, and several days having elapsed since its hearing. Green v. Bonaffon, 2 Miles (Pa.) 219.

In Van Lieuw v. Johnson, decided in March, 1871, but not reported, and cited in Person v. Grier, 66 N. Y. 124, 126, 23 Am. Rep. 35, the court held in substance that a summons could not be served upon a defendant, a nonresident of the state, while attending a court in the state as a party. The order, however, was denied upon the ground that the party had lost his privilege by remaining within the state an unreasonable and unnecessary time after the close of the trial upon which he had attended, but not without the dissent of two of the judges.

In Marks v. La Société Anonyme de l' Union des Papeteries, 19 N. Y. Supp. 470, 46 N. Y. S. R. 660, the question was whether a director and president of the defendant's society was actually in this country as a witness at the time of the service of the summons upon him, and for no other purpose, the facts showing that he was cabled here as a witness, and that he left Brussels but on arrival found the action had been tried and a verdict rendered against his company, but although not needed as a witness, his evidence was taken *de bene esse* after verdict, in view of a possible new trial. The witness transacting business in the meantime the court held the service of summons valid, as there was unnecessary delay in the taking of his depositions and that attending to business while here occasioned a loss of privilege.

Where the defendant claimed that he was engaged in the military service of the United States, and the suspension of plaintiff's remedy by the Act of March 2, 1865, section 1, of which exempted him from service of all civil process during their military service, the court held that the legislature had not declared the service of process void, but had attempted to confer a personal privilege upon those falling within the class designated, and that such privilege might be waived; that the defendant availing himself of the exemption should move to set aside the service and not appear generally by answering, which was submitting himself to the jurisdiction of the court and a waiver of privilege. Williams v. M'Grade, 13 Minn. 174.

ment has been sued and a judgment recovered against him in the perhaps far distant state where he resides, the value of the bond as a security to the alleged debtor, and as a means of preventing the fraudulent and reckless abuse of the process of the court, will be greatly diminished, if not in many cases made absolutely worthless.

It would seem, therefore, that whatever rule of exemption we may adopt in regard to suitors generally in civil actions when the occasion arises, that neither public policy

In Rex v. Platt, 3 W. N. C. 187, a rule was applied for to set aside a summons on the ground that defendant was served while attending the trial as a witness in another jurisdiction, the trial of the case being postponed when the defendant returned to Philadelphia, where he had no special business and for the probable purpose of seeing the Centennial, and while there was served with the writ in question, and left Philadelphia for the place of trial after service of the writ in order to be in time for the trial, and the court discharged the rule.

IX. *The question of deviation.*

The law is not so strict in point of time as to require a party to set out immediately after the trial; a little deviation or loitering will not forfeit the privilege, provided the act be done in good faith, and the delay and deviation not for the purpose of transacting private business. Chaffee v. Jones, 19 Pick. 261.

There is no deviation where the delay is fully justified. Jacobson v. Hosmer, 76 Mich. 234.

A party may be indulged in remaining to learn the verdict of a jury, who cannot separate after a cause is committed until they pronounce a verdict. Clark v. Grant, 2 Wend. 257.

A party returning from court is not bound to go the direct road, necessary deviations being allowed. Chaffee v. Jones, 19 Pick. 261.

Yet there must not be any unnecessary delay or deviation. Farmer v. Robbins, 47 How. Pr. 415.

When his business is done he must return, so as not to be guilty of a material deviation. *Ex parte* Hurst, 1 Wash. C. C. 186.

The defendant must be free from laches in his efforts to get rid of the arrest to which he has a valid objection. Farmer v. Robbins, *supra*.

The burden of establishing a deviation rests upon the arresting party. Salbinger v. Adler, 2 Robt. 704.

His privilege, however, ought not to avail him if the deviation is equivalent to an abandonment of the original journey, for the purposes of pleasure or family visiting. Miner v. Markham, 28 Fed. Rep. 387; Rex v. Platt, 3 W. N. C. 187.

A witness has a reasonable time to return to his residence, but if instead of doing so he proceeds about his business, he loses his privilege. Shults v. Andrews, 54 How. Pr. 380.

Where the deviation is for a distinct purpose disconnected with the return home of the party, he will not be protected. Chaffee v. Jones, 19 Pick. 261.

Stopping to attend to other matters has been held a deviation. Salbinger v. Adler, *supra*; Clark v. Grant, 2 Wend. 257; Chaffee v. Jones, *supra*; Smythe v. Banks, 4 U. S. 4 Dall. 329, 1 L. ed. 854.

Where it appeared that the defendant was not returning home from court at the time of his arrest, but that in returning home he unnecessarily deviated from the direct route in order to attend a funeral, the court held he forfeited his privilege. Chaffee v. Jones, *supra*.

Where the deviation was occasioned by circumstances which rendered it justifiable if not absolutely necessary, it was held no waiver of the privilege. Miner v. Markham, 28 Fed. Rep. 387.

X. *English doctrine.*

A party is protected *eundo, morando et redeundo*. King v. Hall, 2 W. Bl. 1110.

The privilege exists in all cases, whether civil or criminal, in respect to witnesses, jurymen, and prosecutors. Gilpin v. Cohen, L. R. 4 Exch. 131.

In Magnay v. Burt, 5 Q. B. 381, Davis & M. 652, it was held that a party arrested by the sheriff while attending as a witness had no ground of action for damages, but his only remedy was by application to the court and by whose authority he had been compelled to appear as a witness, the privilege being not that of a person but of the court, and therefore discretionary.

The protection of a witness is founded upon the suggestion that a person properly in attendance ought not to be prejudiced in his own interests by his attendance. Webb v. Taylor, 1 Dowl. & L. 684, 13 L. J. Q. B. 24, 8 Jur. 39.

In Cole v. Hawkins, 2 Strange, 1094, the defendant was served with copy bill while attending the sitting of a cause wherein he was defendant. The court held the privilege was designed to prevent any interruption of the business of the court, and such service was a contempt for which the lawyer would be arrested, but that he consented to waive the proceedings and pay the costs.

However inferior the tribunal may be, if it be a lawful one the privilege on principle exists. *Ex parte* Cobbett, 7 El. & Bl. 955, 26 L. J. Q. B. 233, 3 Jur. N. S. 565.

But this does not extend to a person going voluntarily with a view of commencing a proceeding as a common informer. *Ibid.*

The privilege of a witness does not depend upon the subpœna, no subpœna being necessary where the witness lives abroad. Walpole v. Alexander, 3 Dougl. 45.

The insolvent court is a court of justice. Chauvin v. Alexander, 31 L. J. Q. B. 79, 2 Best & S. 47, 31 L. J. Q. B. 79, 8 Jur. N. S. 262, 10 Week. Rep. 248.

On general principles there is no difference between an insolvent and any other court in this respect. *Ibid.*

A bankrupt is privileged while attending before the commissioners. Arding v. Flower, 8 Term Rep. 534, 3 Esp. 117.

In *Ex parte* King, 7 Ves. Jr. 312, it was intimated that a creditor attending to prove his debt, though not under summons, was entitled to privilege.

In Spencer v. Newton, 6 Ad. & El. 623, 1 Nev. & P. 818, 1 Jur. 52, the court questioned whether the privilege would be extended to the case of the detention of a witness through sickness.

The question in such cases always is whether the person arrested was at the time of his arrest bona fide engaged in the business he was called on to execute. Heron v. Stokes, *Re* Owen, 6 Ir. Eq. Rep. 125.

In Davis v. Sherron, 1 Cranch, C. C. 297, a witness was attached while in the gallery of the court-room, and the court held the service was not good.

A party on his return from a court of justice ought substantially to receive its protection, and to have the benefit of its dignity and quiet till he reached his home. Pitt v. Coomes, 5 Barn. & Ad. 1078, 3 Nev. & M. 212.

A party is not bound to go the nearest way home, and if he does not abuse the privilege for the purpose of going about a business of his own, he is entitled to be discharged. Willingham v. Matthews, 6 Taunt. 356, 2 Marsh. 57.

If a party shows that he is on his way home, it is for the party who arrests him to show a deviation.

nor the due administration of justice demands that we should hold the appellee exempt from the service of the summons issued against him to compel him to answer in damages for the alleged wrongful issuing of the attachment in question. Sound public policy, on the contrary, as well as the administration of equal justice, would seem to demand that no inducements should be held out to non-resident suitors to avail themselves of the harshest remedy known to our statutes; but if they should come, and should abuse the remedy to the injury of an alleged debtor, let them answer here, as the residents of this state must do in like cases.

In conclusion we need only say that we think it unnecessary to discuss further than we have already done *Bolgiano's Case*, for whether or not the principles there announced and the cases there cited to support them establish, as contended by counsel for appellee in the additional brief filed a few days ago, that generally, plaintiffs, defendants, and witnesses are all equally exempt from civil process while attending court in another state, the case now before us, for the reasons we have given, is unlike that case and the cases therein cited.

We must not be considered as agreeing that *Bolgiano's Case* goes to the extent contended for by the appellee here. The exemption from service of civil process enjoyed by witnesses in this state under the rule laid down in the case cited should not be further extended, except upon the most careful consideration.

Order reversed and cause remanded.

Selby v. Hills, 8 Bing. 166; Lightfoot v. Cameron, 2 W. Bl. 1113; Willingham v. Matthews, *supra*.

The doctrine of deviation must not be carried to such an extent that whenever the officer sees the party going one yard out of his way home he may immediately arrest him. The party should not be dodged too closely. Pitt v. Coomes, 5 Barn. & Ad. 1078, 3 Nev. & M. 212.

The delay on the road must not be too great or the deviation unreasonable. Randall v. Gurney, 3 Barn. & Ald. 252, 1 Chitty, 679.

In *Ex parte* Clarke, 2 Deacon & Ch. 99, a witness from a distant part of the country attending court upon a summons was arrested for debt while waiting for his conveyance home. The court held he was entitled to be discharged, even though he had gone some little distance to another part of the city before taking the conveyance.

The privilege of a party attending his own cause extends to a bankrupt on his return from attending his petition for leave to surrender after expiration of the time, where he has deviated no further than to call on the solicitor to arrange the proper steps for giving effect to the order. *Ex parte* Jackson, 15 Ves. Jr. 117.

And where two witnesses staid in the town in which the trial took place for the purpose of returning home by coach on the succeeding day, it was held they were privileged from arrest. Hatch v. Blissett, 2 Strange, 986.

Where a person returning home from a motion in a case to which he was a party, called in at an office where he kept his papers but did not reside, for the purpose of refreshing himself and sorting the papers, remaining there one or two hours, when he left and went into a taylor shop in the same locality, intending, however, to proceed home immediately, when he was arrested by an officer who had watched him from the court, it was held he was entitled to the privilege of the party *redeundo* from the court and must be discharged. Pitt v. Coomes, 5 Barn. & Ad. 1078, 3 Nev. & M. 212.

In Atty-Gen. v. Skinners, Co., *Ex parte* Watkins, 3 Sim. 577, 1 C. P. Coop. t. the privilege was objected to upon the ground that the applicant did not take the shortest road to his residence, and that he stopped to speak to an acquaintance in the street and deviated from his course by going into a public house. The court held that although the road taken by him was not the shortest possible, yet it being one not unusually taken, that he might therefore reasonably and fairly take it, and that his stopping to speak to an acquaintance, or his deviating a yard or two from his course for the purpose of taking refreshment, was not a sufficient ground for deviation and did not deprive him from his benefit of privilege.

In Poole v. Gould, 1 Hurlst. & N. 99, 25 L. J. Exch. 250, it was held it was no ground for setting aside the service of a summons, that it was served on the defendant while attending in a *nisi prius* court, in obedience to a subpœna to give evidence in a cause in which he was plaintiff, the court stating that the service of summons would not be set aside on slight grounds, and that every opportunity ought to be afforded to persons to serve debtors with writs.

A witness is not protected in going three days before the time appointed for his examination to the solicitor's office to look at the interrogatories in view of preparing himself. Gibbs v. Phillipson, 1 Russ. & M. 19, 8 L. J. Ch. 43.

In Randall v. Gurney, 3 Barn. & Ald. 252, 1 Chitty, 679, the defendant, who was summoned to give evidence in an arbitration in a distant court, left for that jurisdiction three days before and went to where his wife resided, and sought up papers necessary to be produced by the arbitrator, occupying a greater portion of two days in selecting and arranging the same, and on the afternoon of the second day was arrested. The court held he could not claim the privilege, having employed more than a reasonable time for the above purpose, he not having sworn that he was occupied the whole time in the object of the suit.

Where a party to a cause had attended before the master upon a summons, and having left the office was arrested on his way home, it was held, it appearing that the direction he took was beyond the jurisdiction of his residence, that there was a deviation which deprived him of his privilege. Heron v. Stokes, *Re* Owen, 6 Ir. Eq. Rep. 125.

The application should be made to the court out of which the attachment issues. Pitt v. Evans, 2 Dowl. P. C. 223. E. W.

MICHIGAN SUPREME COURT.

Stephen BALDWIN
v.
George S. HOSMER, Circuit Judge.

(.....Mich.....)

1. **The title to the twenty per cent of the assessments levied by the Order of Iron Hall** which is retained by the local branches, as well as to the eighty per cent which is transmitted to the supreme sitting, is under the laws of the order in the supreme sitting.
2. **Local branches of a secret benefit order cannot,** when called upon to pay over assessments which they have collected under the laws of the order and which by such laws belong to the supreme sitting, question the validity of the incorporation of the supreme sitting.
3. **An ancillary receiver may be appointed** by the Michigan chancery court to aid the receiver appointed for a benefit society by the courts of the state of its residence, in collecting assessments located in Michigan and which belong to the order.
4. **Local branches of a foreign benefit society which has become insolvent** cannot refuse to turn over assessments in their hands to an ancillary receiver appointed to aid the foreign receiver in collecting in the assets, to be by him transmitted to the foreign receiver for distribution in the discretion of the court, if such disposition appears to be proper and consistent with affording due protection to the citizens of the state.
5. **Funds which have been garnished** will not be directed to be turned over to the receiver until the rights of the plaintiffs in the garnishment proceedings have been disposed of.
6. **Contempt proceedings are not appropriate for the trial of issues** involving the title to a fund raised by assessments upon the members of the benefit society, which is in the possession of the local branch from whose numbers it came, nor to determine the validity of a lien alleged to have been acquired by garnishment proceedings against it.

(June 16, 1894.)

APPLICATION for a writ of mandamus to compel respondent as judge of the Circuit Court to punish for contempt certain persons who were officers of local branches of the order of iron hall, for refusing to turn over funds in their hands to a receiver who had been appointed by the court. *Denied.*

The facts are stated in the opinion.

Mr. **Carlos E. Warner** for relator.

Mr. **Charles A. Kent** for respondent.

Long, J., delivered the opinion of the court:

This is an application for a writ of mandamus to compel the respondent, who is one of the judges of the circuit court for the county of Wayne, to punish as for contempt certain persons who are officers of a local branch of the Order of the Iron Hall. The petition alleges substantially that the Order of the Iron Hall is a corporation organized at the city of Indianapolis, Ind., in the month of July, 1881, under and pursuant to the provisions of article 8, chap. 24, of the Revised Statutes of the state of Indiana; that, after its formation, it entered upon the business for which it was organized, and solicited memberships throughout the different states of the Union. The business of the order was carried on by and through the instrumentalities of so-called "local" or "sisterhood" branches, which were responsible to the main organization, and which, as declared by their constitutions, were required to consist of no less than 16 members, who should possess certain powers and privileges under the jurisdiction of the supreme sitting. There were about 1,190 local branches established in the United States, and 9 in Canada, making a total membership exceeding 60,000 persons, including those in the benefit division and life division, all of whom were subject to the authority and control of the main organization and its officers, under the articles of association, constitution, laws, and regulations of the supreme sitting, and each of which said local branches has in its hands, accumulated as a reserve fund, a large amount of money, the amount in Detroit alone ranging from $300 to $14,000. The supreme sitting continued to exist and carry on its business until about the 29th of July, 1892, when it became insolvent; and upon a bill filed in the superior court for Marion county, Ind., one James F. Failey was on the 23d day of August, 1892, appointed receiver of all the property and effects of every kind of the Iron Hall, both within and without the state of Indiana, with full power to receive, demand, and collect in his own name, as receiver, from the defendant and all of its officers, agents, branches, bankers, and any and all other persons, whether within or without said state, and to take, hold, and keep in his possession, under the direction of said court, all of said property, rights, credits, and effects, books, papers, and things, of any and every description, belonging to the defendant at the time of bringing such action on July 29, 1892, or since acquired, and to do and perform all and singular the duties imposed upon him and required by law. Mr. Failey duly qualified as such receiver, and entered upon the performance of his trust.

On the 2d of December, 1893, a final decree was entered in that court and cause, in which it was adjudged that the order of the iron hall, at the commencement of said action, was, and ever since had been, insolvent and unable further to carry on the business for which it was organized, and that its assets and property should be reduced to money, paid and applied upon its debts and outstanding obligations; and Mr. Failey was continued and confirmed as permanent receiver of said order. September 27, 1892, a bill of complaint was filed in the circuit court for the county of Wayne, in chancery, by one

NOTE.—In connection with the above case as to the exercise of comity toward the foreign receiver of the Iron Hall, see Fawcett v. Supreme Sitting of Order of I. H. (Conn.) 24 L. R. A. 815, and Buswell v. Supreme Sitting of Order of I. H. (Mass.) 23 L. R. A. 846.

See also 32 L. R. A. 311; 41 L. R. A. 367.

Lewis P. Durkee, in behalf of himself and all others interested who should choose to come in and be made parties, praying that a receiver be appointed in aid of and ancillary to the administration and receivership of all the property and effects of the defendant corporation appointed by the court in Indiana; and on the 1st of October, 1892, an order was entered in said Wayne circuit court, in chancery, appointing Stephen Baldwin, of Detroit, this state, as such ancillary receiver of all the property and effects of the order within the state of Michigan. Mr. Baldwin thereupon duly qualified, and entered upon the discharge of his trust, and such proceedings were thereafter had that on February 9, 1894, a final decree was entered in said Wayne circuit court, in chancery, in which it was declared that the defendant corporation, or supreme sitting of the Order of the Iron Hall was on the 29th of July, 1892, and ever since has been, insolvent; that it was unable further to carry on the business for which it was organized within the state of Michigan and elsewhere; and that its assets and property should be reduced to money, and applied upon its debts and outstanding obligations and liabilities,—and in which decree Mr. Baldwin was further continued and confirmed as ancillary permanent receiver of all such assets within the state of Michigan, with direction and authority, among other things, to take, hold, and convert into money, under the order and direction of the court, all the property, real, personal, and mixed, of every kind, belonging to said supreme sitting of the iron hall, with full power to demand, receive, and collect in his name as receiver or otherwise, as he might deem proper, from the defendant and all its agents, officers, branches, bankers, and any and all other persons within the state of Michigan, all such property and effects, and to take, hold, and keep in his possession, under the direction of the court, all such demands and effects, books, papers, and property, and other things, of every description, belonging to the defendant corporation on July 29, 1892, or since acquired, and to do and perform all and singular of the duties imposed upon him or required by law. It is further alleged in the petition that the organization was effected and existed only under the laws of the state of Indiana, and that the branches of the order existed, not by independent authority in any state in which they are situated, but solely by the authority of the charter granted to them in pursuance of the constitution and laws of the order under which they were permitted and organized. It is further shown that local sisterhood branch No. 5, so called, was one branch of the supreme sitting of the order in the state of Michigan, and was organized as such under the rules, regulations, constitution, and laws of the supreme sitting; that, at the time of the filing of the bill in this cause, Peter J. Schiffer, Jr., was the chief justice of said branch, Fred J. Kirtz accountant, John J. Starling cashier, and George Leitch, Fred. Linsell, and Charles Hampshire trustees; that afterwards Fred J. Kirtz removed from the city of Detroit, and one Carlton H. Royce was appointed or elected his successor, and that Charles Hampshire died, and Charles Beck was afterwards appointed or elected his successor, as trustee; that, at the time of filing the bill in this case, the said chief justice, accountant, cashier, and trustees had charge of the funds, property, and assets of the supreme sitting, which were collected and received through the instrumentality of said local sisterhood branch No. 5; and that they then held in moneys, property, and securities of said order the sum of about $20,000, which was subject to the order and direction of the supreme sitting, subject to the decree before mentioned; and that, at the time of filing this petition, the said officers and trustees held the moneys in the possession of the branch, which sum was subject to the order and direction of the supreme sitting, subject to said decree. It is further alleged that the petitioner caused a copy of the order appointing him receiver in this state, and a copy of the final decree in the cause, to be served upon the officers and trustees of said branch No. 5, and also caused personal written demands to be made upon each and every of said officers and persons for all moneys, property, goods, chattels, and effects in their hands belonging to the supreme sitting; but that said officers and trustees refused to comply with such demands and pay over the said moneys, property, and effects to the petitioner.

It appears that on March 12, 1894, the petitioner caused a petition to be filed in the Wayne circuit court, in chancery, praying that the officers of local branch No. 5 of said order might be ordered and required to show cause in said court why they should not be punished for contempt in neglecting and refusing to turn over to the petitioner such moneys, property, and effects in their hands and under their control, and that an attachment or other process might be issued requiring the persons named to comply with such order; and that, on said 12th day of March, that court entered an order requiring such persons to show cause on the 19th of March why they should not be punished for contempt, and why an attachment should not issue as prayed in the order. On the 19th day of March, in response to the order, the officers and trustees of said local branch appeared and answered the petition. In their answer they say: (1) That they were not parties to or bound by the proceedings by which Mr. Baldwin was appointed receiver ancillary to the receiver appointed by the court of Indiana; and, upon information, they assert that the appointment of Mr. Baldwin was made at the instance of the Indiana receiver, though, as he is not a party, he cannot be bound thereby, and for the purpose of taking all the funds belonging to branch No. 5, as well as those belonging to other branches, out of the state, and distributing them mainly among persons who have not contributed to them, and against the equitable rights of the members of branch No. 5, and that his appointment is unauthorized and void. (2) That the Order of the Iron Hall, and especially of the supreme sitting thereof, was devised and conducted

with the grossest fraud; and that this appears in the bill filed in the cause; and that, in consequence, any contract between said supreme sitting and the local branches is void, at the option of said branches. They aver further, on the advice of counsel, that, while said order claimed to be a corporation organized under the laws of Indiana, in fact there has not been and is not any law in Indiana under which said corporation could organize, and the claim to be a corporation is a fraudulent scheme, devised to deceive and defraud the members of the local branches. (3) That all the funds in their hands have been contributed by the members of said local branch No. 5; that these moneys were contributed by each member under the belief that he would receive the benefits promised in the contract; and that, with the failure of the order, justice requires that these moneys should be returned to those who contributed them. (4) That, under the rules of the order, every local branch, in proportion to the number of its members, should have a fund nearly equal to that held by any other local branch; and that, if the funds in the possession of each branch be distributed among its members, justice will be better done than in any other way. (5) That if the money in question is to be sent to Indiana, and there distributed, the members of local branch No. 5 will be put to great expense in proving their claims in the Indiana court; that, as they are informed and believe, dividends have already been made by said Indiana receiver in which the members of said branch No. 5 will not be able to participate; and that the result will be that such members will receive a much smaller dividend than if the money be divided among those who have contributed it. (6) They admit that the fund in their hands or under their control is respectively as follows: Peter J. Schiffer has nothing. Fred J. Kirtz has about $1,000. Carlton H. Royce has nothing. John J. Starling, George Leitch, Frederick Linsell, and Charles L. Beck have in money and securities about the sum of $15,000. (7) The respondents Leitch and Linsell, further answering, say that on or about August 23, 1892, they, with John J. Younghusband and Charles Hampshire, were served with a writ of garnishment issued out of the circuit court for Wayne county in a cause then pending, in which Lewis Cohen is plaintiff, and the supreme sitting of the Iron Hall defendant; that they, as garnishee defendants, are enjoined from paying over the money or delivering any property or effects to said principal defendant until the further order of the court; that said cause is still pending and undetermined in said court; that said Charles Hampshire, named in said writ, is now dead, but that, at the time of service of said writ, he was one of the trustees of branch No. 5; and that Beck, one of the respondents herein, was duly appointed as his successor.

The issues raised by these pleadings were referred by the court to a commissioner to take proofs, whereupon the parties entered into a stipulation as to the facts which they deemed material to the issues. The stipulation admits the organization of the defendant company, and also sets out the various provisions of the statutes of Indiana authorizing the formation of corporations which were in force at the time this corporation was organized. The court thereupon entered an order denying the relief asked, and refusing to adjudge the parties guilty of contempt. It is now averred by the petition here that, under the pleadings and proofs so stipulated, it is shown that the officers and members of local branch No. 5 received their charter and right from and under the supreme sitting, and that the property, money, and effects held by said branch belong to the supreme sitting; and it is prayed that a writ of mandamus issue to be directed to the Honorable George S. Hosmer, circuit judge, commanding him to show cause why he should not set aside and vacate the order denying the relief prayed, and why he should not proceed, in said court and cause, to compel the payment of said moneys now in the hands of such local branch to such ancillary receiver by the ordinary proceeding as for contempt, and why he should not enter an order in said court and cause adjudging the officers of said local branch in contempt of the authority of the court in neglecting and refusing to pay over said moneys. An order to show cause was issued, and the circuit judge has made a return thereto substantially as follows: (1) That the order and decree appointing Stephen Baldwin as receiver of the assets of the Order of the Iron Hall, the order that the local branches turn over the assets to said receiver, were granted in a suit in which none of said local branches or their trustees or other officers were made parties; that said order and decree were made without opposition or discussion, and by the consent of all the parties then represented. (2) That when the answer of Peter J. Schiffer and others, officers of branch No. 5, was filed in the contempt proceeding instituted by said receiver, it became evident that several serious questions of law were involved, some of which are as follows: (a) Whether or not there was any law of Indiana authorizing the formation of the corporation of the supreme sitting of the Order of the Iron Hall. (b) Whether or not the bill does not show that the organization of such association was so fraudulent as to release all the branches from their obligations or contracts entered into with said supreme sitting. (c) Whether or not, on the dissolution of said supreme sitting, from whatever cause, equity does not require that the moneys in the hands of the local branches be distributed among the persons who have contributed to the same, the purposes of such contributions having wholly failed. (d) Whether or not a court of equity in this state will not protect the persons equitably entitled to the funds held by the local branches of this state by a decision here, instead of compelling them to prove their claims before the court of Indiana, and taking such dividends as may be there ordered. (e) Whether or not the different local branches have such connection as renders the appointment of one receiver for all proper. (f) Whether or not it is proper for a court of equity to appoint in this state a

receiver ancillary to the Indiana receiver. (g) Whether or not, under the averments of the bill to the effect that all the assets of said supreme sitting have been assigned to said Failey, by the voluntary assignment of said supreme sitting, any receiver should be appointed of such assets, or whether such appointment is not, for this cause alone, void. (3) That this respondent is of the opinion that it is not proper that said cause should be decided on application to punish for contempt; that, in his opinion, when only persons who are not parties to a suit in which a receiver is appointed make a bona fide claim to property claimed by the receiver, the dispute should be decided in a regular suit brought by the receiver against the parties making the claim, and he submits that this rule is laid down by the authorities, citing *Ex parte Hollis*, 59 Cal. 405; *Re Paschal*, 77 U. S. 10 Wall. 483, 19 L. ed. 992; Beach, Receivers, § 247; *State* v. *Ball*, 5 Wash. 387. (4) For these reasons, the respondent refused to punish the officers and agents of local branch No. 5 for not turning over this fund to the receiver; but, at the same time, the court offered the attorney for the receiver, and who has appeared in said proceeding for him, an order permitting the receiver to sue the officers and agents of the local branch, and this offer was refused.

There is returned into this court, as a part of the case, a copy of the decree made by the Indiana court appointing Mr. Failey receiver, and defining his powers and duties, together with the several orders made by that court, the constitution and by-laws of the order of the supreme sitting, a copy of the bill filed by Mr. Durkee, and the decree made by the Wayne circuit court appointing Mr. Baldwin ancillary receiver, and defining his powers and duties. It appears from the decree of the Indiana court that the corporation was organized under the Indiana statute. Whether such organization was authorized by those statutes does not seem to have been raised by the Indiana court, or, if so, the proceedings before us do not disclose the fact. That court proceeded to authorize the winding up of the concern and the collection of the assets, and, for that purpose, directed the receiver to collect from the local branches and others, whether within or without the state of Indiana, the property and assets of the corporation. Upon the appointment of the ancillary receiver within this state, he was authorized to receive and collect in the assets within this state; but it is nowhere provided in the decree that the moneys shall be transmitted by the ancillary receiver to the receiver at Indianapolis, but that he shall report to the court his doings in the matter, to the end that the court may make such further order in the premises as justice and equity may require. By the articles of association and the laws of the company, these local branches are made subordinate to the supreme sitting. All their powers and duties are set forth therein, and they exist only by authority of the law of the supreme sitting. The moneys now held by the officers of local branch No. 5 were collected by and under the authority thus conferred. The constitution and laws of the order provide for the raising of these funds. Section 1, law 1, is as follows: "There shall be attached to this order a benefit fund in which members may participate (except social members) as they may severally elect, either in the sum of one thousand dollars, eight hundred dollars, six hundred dollars, four hundred dollars, or two hundred dollars, on which they shall pay the rates and be entitled to the benefits prescribed in the following table," etc. One of the objects of the organization, as stated in article 2, § 3, of the constitution, is as follows: "To establish a benefit fund from which those who have held membership in the order for thirty days or more may, should they so desire, on proper application, and complying with all the rules and regulations governing said benefit fund, become participants therein, and may receive the benefit of a sum not exceeding twenty-five dollars per week, nor more than one half the amount of the benefit certificate held by each member, when, by reason of disease or accident, they become totally disabled from following any avocation; or in case of death, if a member for more than two years, one half of the amount of the benefit certificate will be paid, less benefit received; or an amount of not more than one thousand dollars when they have held a continuous membership in the order for seven years: provided, however, that the sum total drawn from this order by any of its members shall never exceed in sick, disability, death, and final benefits the sum named in the benefit certificate." This benefit fund was derived from assessments upon the holders of benefit certificates, which assessments were made by the supreme sitting of the order from time to time, and out of which benefits were paid in case of the sickness, disability, or death of a member. The assessments were made through the local branches, and 80 per cent thereof was sent to the supreme cashier of the supreme sitting. Law 11, § 1, is as follows: "Twenty per cent of the amount received by each branch on each assessment shall be set aside and retained as a reserve fund, which fund is the property of the supreme sitting, and shall be subject to its control at all times as hereinafter provided. At the expiration of the first term of six years and six months from the date of the organization of the order, one seventh of the reserve fund then on hand shall be called for by the supreme accountant, and used by the supreme cashier in the payment of the benefits; and annually thereafter one seventh of the reserve fund on hand shall be called for and used in like manner, unless otherwise ordered by the supreme sitting." An examination of the various provisions of the constitution and laws of the order convinces us that the legal title to this reserve fund is in the supreme sitting of the order, and not in the different local branches; that the 20 per cent of the assessment retained by each local branch differs from the 80 per cent transmitted to the supreme sitting, mainly in this: that the possession and supervision subject to the constitution remain with the local branches. The whole fund is for the protection of, and payment of benefits to,

holders of benefit certificates; and the reserve fund seems to us essentially a part of the benefit fund, although it may be in the nature of a safety fund to insure the payment of maturing certificates. This question has lately been before the courts of last resort in Massachusetts. The case is not yet officially reported, and is entitled *Bunnell* v. *Supreme Sitting of Order of I. H.* 161 Mass. 224, 23 L. R. A. 846. There it was held that the funds held by the local branches of the order belong to the supreme sitting, and we think there can be no escape from such conclusion. In a late case in equity, brought in New Jersey, the vice-chancellor holds the same rule, and determined that the fund belonged to the home company. The case is *Ware* v. *Supreme Sitting of Order of I. H.* (N. J. Eq.) 28 Atl. 1041, and is not officially reported. Several of the states, through their courts of last resort, have passed upon this question, and, so far as we have found, have not held to the contrary.

It is said, however, that there was no legal incorporation in Indiana. We are not called to pass upon that question. The courts of Indiana have permitted the proceedings to be brought there to wind up the affairs of the order as a valid and subsisting corporation, and have recognized its legal status. The several courts of other states have also taken jurisdiction by the appointment of ancillary receivers to aid in collecting the funds to be transmitted to the home receiver. But we think the parties here are not in a position to raise that question. These local branches and their officers are a part of the order, and cannot, in this proceeding, question its due incorporation. *Merchants & Mfrs. Bank* v. *Stone*, 38 Mich. 779; *Empire Mfg. Co.* v. *Stuart*, 46 Mich. 482; Niblack, Mut. Ben. Soc. § 2. The object of the association was to create what is called a "benefit fund." The constitution and laws of the order were the contract between the parties. Courts can only enforce the contract as made, which is that the fund shall belong to the supreme sitting, and be distributed so that each member shall derive a benefit from the entire corpus of the assets of the supreme sitting, without regard to his local habitation. It was for the purpose of collecting in these assets in this state that the ancillary receiver was appointed. There can be no doubt of the right of a court of chancery within this state to make the appointment. Mr. Baldwin was so appointed, and is attempting to gather in these assets. These are trust funds for creditors and for distributees under the laws of the order. It is a principle now generally acted upon by the courts that a receiver or other trustee appointed in another state will be permitted, on the principle of comity, to bring an action in the domestic forum for the purpose of collecting the assets of the insolvent for distribution, in accordance with the law of the jurisdiction within which the receiver has been appointed, when so to do will not contravene the rights of citizens of the state in which the action is brought. *Metzner* v. *Bauer*, 98 Ind. 425; *Bagby* v. *Atlantic, M. & O. R. Co.* 86 Pa. 291; *Toronto General Trust Co.* v. *Chicago, B. & Q. R. Co.* 123 N. Y. 37; *Comstock* v. *Frederickson* 51 Minn. 350; *Graydon* v. *Church*, 7 Mich. 36.

But the rule of comity is never allowed to operate when it will contravene the rights of a citizen of the state where the action is being taken. So far as this local branch and its officers and members are concerned, however, they are part and parcel of the corporation. The receiver appointed in Indiana and the ancillary receiver appointed here, not only represent the creditors of the corporation, but stand in its stead; and under the decree of the Indiana court and the Wayne circuit court, in chancery, in this state, they are directed to gather in the assets; and, unless some reason is shown why that order should not be carried out, this local branch and its officers and members cannot refuse to turn over the assets to the ancillary receiver, and, when he has possession of such assets the court may order them transmitted to the Indiana receiver. But such order should be made only when it is made certain to the court that the members from this state would share proportionately with the other members throughout the organization. The fund is found in many different states, and comity requires that we should do all we can to insure, as far as possible, a speedy distribution of the whole property among those entitled to it. But the court below must have some discretion in making this order so that the rights of the citizens of this state may be protected.

By the answer of the local branch and its officers, it appears that the fund has been garnished in their hands, and that such proceedings are still pending and undetermined. Certainly, the court would not make an order for the payment of this fund into the hands of the receiver until the questions arising under the garnishment proceedings are determined. The plaintiffs in those cases have a right to their day in court before they can be deprived of the fund, or before the local branch and its officers are bound to pay it over to the receiver. The plaintiffs in the garnishment proceedings are not parties here, and their rights cannot be here litigated. If they have obtained a valid lien on the fund, that lien is not dissolved by the filing of a bill, and the appointment of a receiver, but may be enforced. *Hubbard* v. *Hamilton Bank*, 7 Met. 340; *Taylor* v. *Columbian Ins. Co.* 14 Allen, 353; *Folger* v. *Columbian Ins. Co.* 99 Mass. 267. Proceedings for contempt are not appropriate for the trial of issues involving the title to this fund, or to determine the validity of the lien which the garnishee claims. *Ex parte Hollis*, 59 Cal. 405; *Re Paschal*, 77 U. S. 10 Wall. 483, 19 L. ed. 992; *State* v. *Ball*, 5 Wash. 387. In Beach on Receivers (section 247) it is said: "It is also equally well settled that, in a proceeding to punish for contempt of court, the question of the title to the property cannot arise or be adjudicated. The court will not in such a proceeding do more than pass upon the bare question of contempt. It will not directly or indirectly assume to consider or to decide to whom the property belongs, or to decide that the receiver has or has not the right of possession in and to it."

The court below offered to permit the receiver to bring suit for these assets, which offer was declined. We think the court, under the facts stated in the answer of the local branch and its officers, properly refused to adjudge the parties guilty of contempt. We may remark, however, that, if the assets are finally paid into the hands of the receiver, it will be the duty of the court to direct that, upon their payment over to the Indiana receiver, the Michigan claimants shall receive a proportionate dividend with creditors elsewhere.

The writ will be denied.

The other Justices concur.

Flora A. POOLE

v.

CONSOLIDATED STREET R. CO., *Plff. in Err.*

(.....Mich.....)

1. **It is not negligence as matter of law to attempt to alight from a car** at a pleasure resort station established by a street railway company, on the side opposite to that prepared for the reception of passengers if those in charge of the car have invited an alighting on such opposite side.
2. **That a car has not reached the usual stopping place** when a stop is made and a passenger attempts to alight, will not render him guilty of negligence if there was no warning not to alight and from the surroundings a passenger might well have understood that the stop was made for that purpose.
3. **Whether or not the unevenness of the ground at a point used by passengers** in alighting from a car is such as to constitute negligence on the part of the carrier is a question for the jury.
4. **A defendant is entitled to have its theory of the case presented** to the jury in specific instructions if such theory is supported by evidence and the instructions are properly requested.

(May 22, 1894.)

ERROR to the Superior Court of Grand Rapids to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

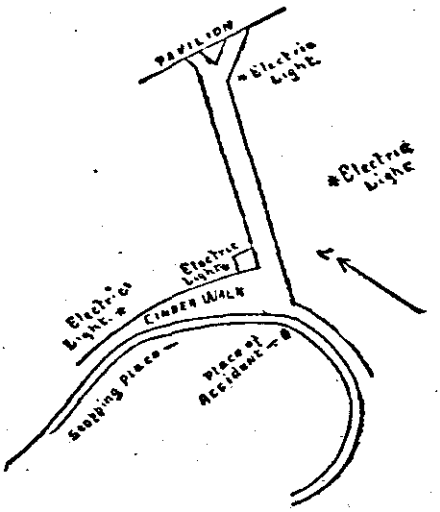
The facts are stated in the opinion.

Messrs. **Kingsley & Kleinhans** for appellant.

Messrs. **Wesselius, Corbitt & Ewing** for appellee.

Montgomery, J., delivered the opinion of the court:

The defendant operates an electric street railroad in Grand Rapids, with a line extending to Reed's Lake, which is a summer resort a short distance east of the city. The company maintains pleasure grounds at this place, including a pavilion and conveniences for visitors. During the summer, the travel over this route is very large. For the convenient transaction of its business, the company's double track is extended and formed into a loop at the Reed's Lake terminus, so that cars may run continuously, without reversing or switching, around this loop, and back to the city. Within this loop is vacant ground, and, on the side to the north, nearest the pavilion, cinders have been spread, connecting with the walk and the pavilion, and forming an admittedly safe landing place. The accompanying sketch sufficiently shows the surroundings to indicate the situation.



On the evening of the 12th of April, 1892, the plaintiff, who had taken passage on one of defendant's cars, in attempting, after the car came to a stop, to alight inside, next the loop, received serious injuries. She brought this suit against the company, alleging that the defendant did not keep its grounds at Reed's Lake, at and adjacent to where said car stopped for passengers to leave the same, in such condition that passengers might alight with safety from said cars by night, but permitted said grounds to be and remain in such a rough, broken, and uneven condition, and permitted a steep bank of earth, of the height of, to wit, six inches, to be and remain at and alongside of said railway at said terminus where said cars stopped for passengers to leave the same, so that passengers alighting from said cars were liable to be thrown down and injured; and alleging that the plaintiff, by reason of the unsafe condition of the grounds, was, without fault on her part, thrown down and caused to fall to the ground with great force and violence, and received the injury complained of. The plaintiff covered a verdict for $5,000, and defendant brings error.

NOTE.—The situation of the stopping place where the accident occurred in the above case, while unusual, is sufficiently like that in many other places to make the decision valuable. For the whole array of cases on injuries received in getting on or off railroad trains (but not including street railway cases), see *note* to Carr v. Eel River & E. R. Co. (Cal.) 21 L. R. A. 354.

The defendant contends that upon the whole record it appears that the landing place provided on the northerly side of the track was suitable and proper, and known to the plaintiff to be so, and that she had no right to alight on the side of the car next the loop, and that, if she chose to do so, it was at her own risk; and it is further contended that the plaintiff's testimony, taken as a whole, failed to make it clear how the injury occurred, and also that the grounds inside the loop were a reasonably safe landing place. A number of other questions are raised, relating to rulings on the trial as to admissibility of testimony, refusal of requests to charge, preferred by counsel for the defendant, and the charge of the court on its own motion, which will be considered in order. The plaintiff's theory is that in attempting to leave the car she stood with both feet on the running board; that a gentleman who was aboard the car assisted her from the running board to the ground; that she clasped his hands in making her descent to the ground, and that, upon stepping down from the running board, she stepped upon the steep bank of earth, which the testimony shows to be somewhere from four to five inches high; that her foot slipped and gave way, and that she fell, and received the injuries in question. The defendant's theory as to the manner of her injury is that the true cause of her injury was not the uneven condition of the ground, but that it was occasioned by some person stepping upon the plaintiff's dress as she was alighting, thereby throwing her to the ground; and the defendant offered the testimony of numerous witnesses tending to sustain this theory.

It is strenuously insisted that, the company having provided a safe landing place on the northerly side of the loop, its full duty to the passengers was performed, and that it cannot be held liable for an injury occurring by reason of a passenger attempting to alight inside the loop. Upon this question the trial judge charged the jury as follows: "A street-railway company has the right to select and adhere to the making of their own arrangements for platforms and landing places at such resorts as Reed's lake, provided, only, that they make the landing place on one side safe and commodious, and so conspicuous that all passengers can see it by day or by night, unless it has been so used, and is so used, and the circumstances are such, in connection with the landing, as amounts to an invitation to alight on the other side;" and, further: "It is certain, under the testimony in this case, that the construction of that walk and landing, running from 30 feet wide down to 10 feet each way, and an extent of from 150 to 200 feet along this north side next to the resort, that it offers a plain and palpable invitation for the passengers upon its trains to get off upon that side; and I have no doubt that under the arrangements as testified to, and uncontradicted, in order for the company to be held as inviting an alighting upon the inside of the loop, that there must be, and should be, some positive act on the part of the company, as if a conductor should invite a passenger to get off upon that side, or as if any arrangements had been made for the landing of passengers upon that side; and I believe the law to be, under the peculiar testimony in this case, that there should be something that you should fix in your minds, other than the fact that passengers upon a loaded train, riding upon the running board, upon the outside, saw fit to jump off within the loop, and run around across the track to the place of amusement." This charge was sufficiently favorable to the defendant, and fairly stated the law of the case, if there was any testimony tending to show that passengers had been, by the course of conduct of the defendant, invited to alight upon the inside of the loop. See *McDonald v. Chicago & N. W. R. Co.*, 26 Iowa, 124, 96 Am. Dec. 114; 2 Redf. Railways, 532. We also think that there was testimony which justified this instruction. According to the plaintiff's testimony, she had previously been helped off the car by conductors inside the loop, and there is abundant testimony in the record that the common practice was to alight on either side indiscriminately. The car was so constructed that passengers could alight from either side, and there was no warning or notice to passengers to step off only on the northerly side. The cars were crowded with passengers, and the evidence shows that, as some would alight, others would press forward and take their seats. Under these circumstances, we are not prepared to say that, as a matter of law, it was negligent to attempt to alight on the inside the loop. But it is said that the car had not reached its usual stopping place, nor the place where plaintiff had been previously assisted to alight. But the car had come to a full stop on the occasion in question. There was no warning not to alight, and a glance at the surroundings is sufficient to indicate that a passenger might well have understood that the stop had been made for that purpose. The evidence shows that not the plaintiff alone, but substantially all, if not all, the passengers, interpreted the stop as an invitation to alight. The cinder walk was opposite the stopping place on the north, and the car was directly opposite the walk which leads to the pavilion. We also think the question of whether the uneven condition of the ground was such as to amount to negligence on the part of the company was, under the circumstances of this case, fairly a question for the jury. The plaintiff's theory was that the bank of earth from which her foot slipped was directly at the point where one, in alighting from the car, would be likely to step upon its edge, and slip backward. We are not prepared to say, as a matter of law, that this was a suitable landing place.

The defendant asked the court to charge the jury as follows: "If the jury find that the space between the outer edge of the running board of the car and the edge of the sod or little embankment was not more than seven or eight inches in width, it was not negligence on the part of defendant to have such a space at that time and place, and the plaintiff cannot recover." This request was refused, and the defendant's counsel assigns error upon its refusal, citing and relying

upon the case of *Ryan* v. *Manhattan R. Co.*, 121 N. Y. 126, as sustaining their contention that the request should have been given. That case is not at all analogous to the present. That was the case of an elevated railway company, which had left a space of from seven to eight inches between its platform and the running board of the car. This running board was presumably substantially upon the same level as the platform, and the court held that some space was necessary between the running board and the platform to enable the company to run its cars, and that, because of a necessary curve in the track, the distance of seven or eight inches was not unreasonable, and that, as it must be known that there is a vacant space between the car and the platform, such a space as could be spanned by a single step of a passenger was not unreasonable, and the leaving of such a space was not negligence. But in the present case the passenger was compelled to step downward in order to alight, the running board of the car being about eighteen inches above the surface of the earth, and we cannot say, as matter of law, that a passenger, in stepping down from the running board of the car, would in all cases step outward more than seven or eight inches. There was certainly no necessity for maintaining an obstruction there which could work injury, and the only legal question which could possibly be involved is whether the situation of this mound was such that one, in landing from the car, would reach it, and be likely to be injured by stepping upon the edge of the mound; and that question the request does not submit, and was therefore properly refused.

In the main, the cause was very carefully presented to the jury; but we think the court committed one error which is important, in view of the defendant's testimony, and the theory upon which it contested the case before the jury. The defendant requested the court to charge the jury as follows: "If the jury find that the injury was occasioned by some one stepping on plaintiff's dress as she was alighting, and she was thereby caused to fall, she cannot recover." This request presented the defendant's theory of the case, and should have been given. The plaintiff denied any such occurrence, and described in detail how she claimed the injury occurred, while the defendant produced a number of witnesses who testified that her first statement of the occurrence was that some person stepped upon her dress, and caused her to fall from the car, and produced three witnesses who witnessed the occurrence, and who gave testimony in the same line. This presented the issue for the jury. There was no middle ground. There was no claim of two concurring causes. There could be no recovery unless the plaintiff's theory of the manner in which the accident occurred was found to be sustained by the proof; and if the testimony offered by the defense, which tended strongly to show that the injury occurred by reason of some person stepping upon her dress, was believed, there was no testimony in the case connecting the cause of the injury with the fault attributed to the defendant in the declaration. The omission to give this request is not cured by the general instruction that, if the injury was caused by accident or misadventure, without fault of either the plaintiff or defendant, there could be no recovery. The defendant had a right to have its theory of the case covered by specific instructions. *Dikeman* v. *Arnold*, 71 Mich. 656; *People* v. *Jacks*, 76 Mich. 218; *O'Callaghan* v. *Boesing*, 73 Mich. 669; *Cooper* v. *Mulder*, 74 Mich. 374; *Wildey* v. *Crane*, 69 Mich. 17; *Babbitt* v. *Bumpus*, 73 Mich. 331; *Miller* v. *Miller*, 97 Mich. 151.

The other questions presented are not likely to arise upon a new trial, but, for the error pointed out, *the judgment will be reversed*, with costs, and a new trial ordered.

Hooker, J., did not sit; the other Justices concurred.

ILLINOIS SUPREME COURT.

Walter P. WARREN *et al.*, *Appts.*,
v.
FIRST NATIONAL BANK OF COLUMBUS.

(149 Ill. 9.)

1. **A part of a debt or a chose in action may be assigned** in equity creating a trust in favor of the assignee and an equitable lien upon the fund.
2. **A fund that exists potentially,** although it is not yet due, is subject to an equitable assignment of a portion of it which will be operative as soon as the fund is acquired.
3. **The charter alone of a foreign corporation** and not the general legislation of the state in which it was created will have effect to limit its powers outside of that state.
4. **The New York statute prohibiting assignments or transfers by insolvent corporations** has no extraterritorial force and does not affect the validity of an assignment by an insolvent corporation executed in Ohio as a transfer of a fund in Illinois.
5. **The mere insolvency of a corporation** does not *eo instanti* deprive its directors and officers of power to dispose of the corporate property in good faith as payment or security of corporate debts, although the effect may be to give some creditors a preference over others.
6. **A factor's lien cannot attach** to goods which never came into his actual possession but were delivered or consigned by the owner directly to the purchasers, even if the factor's contract provided that the goods should be consigned to him for sale.

(October 28, 1893.)

NOTE.—As to validity of preferences among creditors given by insolvent corporations, see *note* to Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co. (Tex.) 22 L. R. A. 802.

25 L. R. A.

See also 31 L. R. A. 497; 39 L. R. A. 254.

APPEAL by defendants, claimants of a fund in the hands of Pullman's Palace Car Company which belonged to the Ohio & Western Coal & Iron Company, other than the First National Bank of Columbus from a decree of the Appellate Court, First District, reversing a decree of the Circuit Court for Cook County giving appellants' claims priority over that of the bank in an interpleader proceeding by Pullman's Palace Car Company to determine the right to such fund. *Reversed.*

The facts are fully stated in the opinion.

Messrs. **Warren & Cox** and **Flower, Smith & Musgrave,** for appellant Walter P. Warren:

There are five objections to the bank's claim:

1. The order was drawn by H. C. Stanwood, who signed as assistant treasurer, but who had no authority whatever to draw such a draft.

Taylor, Corp. § 236; *Koch* v. *National U. Bldg. Asso.* 35 Ill. App. 465; *Adams* v. *Cross Wood Print Co.* 27 Ill. App. 313; *Stokes* v. *New Jersey Pottery Co.* 46 N. J. L. 237; *Thomas* v. *Morgan County*, 59 Ill. 479; *Read* v. *Buffum*, 79 Cal. 77; *Titus* v. *Cairo & F. R. Co.* 37 N. J. L. 98; Morawetz, Priv. Corp. §§ 585 *et seq.*; *Leggett* v. *New Jersey Mfg. & Bkg. Co.* 1 N. J. Eq. 541, 23 Am. Dec. 728; *Stow* v. *Wyse*, 7 Conn. 214, 18 Am. Dec. 99; *Hyde* v. *Larkin*, 35 Mo. App. 365; *Chicago & N. W. R. Co.* v. *James*, 22 Wis. 194; *Hoyt* v. *Thompson*, 5 N. Y. 320, 19 N. Y. 207; *Walworth County Bank* v. *Farmers Loan Co.* 14 Wis. 325.

2. The order was a partial assignment of a particular fund to become due, to the drawer, and is not good unless accepted.

Mandeville v. *Welch*, 18 U. S. 5 Wheat. 278, 5 L. ed. 87; *Chapman* v. *Shattuck*, 8 Ill. 49; *Crosby* v. *Loop*, 13 Ill. 625, 14 Ill. 330; *Chicago & N. W. R. Co.* v. *Nichols*, 57 Ill. 464.

3. The draft is void under the New York statute, because at the time it was given the Ohio & Western Coal & Iron Company had refused the payment of its notes, and the order was drawn and delivered with the intent, and such was its effect, of assigning or transferring the property of the company for the benefit of John M. Glidden, who was a stockholder in and the president of the company.

N. Y. Rev. Stat. 1827-28, § 4, chap. 18; *Lippincott* v. *Shaw Carriage Co.* 25 Fed. Rep. 577; *Adams* v. *Kehlor Mill Co.* 35 Fed. Rep. 433.

4. The order or draft is void under the New York statute because it was given in contemplation of the insolvency of the Ohio & Western Coal & Iron Company.

N. Y. Rev. Stat. 1827-28, § 4, chap. 18; *Robinson* v. *Bank of Attica*, 21 N. Y. 406; *Brouwer* v. *Harbeck*, 9 N. Y. 589; *Bowen* v. *Lease*, 5 Hill, 221; *Harris* v. *Thompson*, 15 Barb. 62; *Sibell* v. *Remsen*, 33 N. Y. 95; *Paulding* v. *Chrome Steel Co.* 94 N. Y. 334; *Pierce* v. *Crompton*, 13 R. I. 312; *Starkweather* v. *American Bible Soc.* 72 Ill. 50, 22 Am. Rep. 133; *Santa Clara Female Academy* v. *Sullivan*, 116 Ill. 385, 56 Am. Rep. 776; *Metropolitan Bank* v. *Godfrey*, 23 Ill. 579, and *note; Ewing* v. *Toledo Sav. Bank*, 43 Ohio St. 31; Wait, Insolv. Corp. § 328.

5. The order or draft is invalid under the common law, as declared by the decisions in the state of Ohio, because it was a preference given by an insolvent corporation, which had ceased doing business.

Morawetz, Priv. Corp. § 803; Wait, Insolv. Corp. §§ 162, 654; *Bouse* v. *Merchants' Nat. Bank of Cincinnati*, 5 L. R. A. 378, 46 Ohio St. 493; *Kankakee Woolen Mill Co.* v. *Kampe*, 38 Mo. App. 229.

Glidden & Curtis, as sales agents, never had such possession of the property out of which this fund arises as to acquire a lien thereon.

Mechem, Agency, §§ 676 *et seq.*; *Strahorn* v. *Union Stock Yard & T. Co.* 43 Ill. 427, 92 Am. Dec. 142; *Winne* v. *Hammond*, 37 Ill. 99.

Glidden & Curtis acquired no right to a lien on this fund by virtue of the contract of November 3, 1887.

Boomer v. *Cunningham*, 22 Ill. 320, 74 Am. Dec. 155; *Hunt* v. *Bullock*, 23 Ill. 320; *Allen* v. *Montgomery*, 48 Miss. 101; *Strong* v. *Krebs*, 63 Miss. 338; *Hoffman* v. *Brungs*, 83 Ky. 400; *Cook* v. *Brannin*, 87 Ky. 101; *City F. Ins. Co.* v. *Olmsted*, 33 Conn. 476; *Clay* v. *East Tennessee & V. R. Co.* 6 Heisk. 421; *Read* v. *Mosby*, 5 L. R. A. 122, 87 Tenn. 759; *Moody* v. *Wright*, 13 Met. 17, 46 Am. Dec. 706; *Chynoweth* v. *Tenney*, 10 Wis. 403; *Stearns* v. *Quincy Mut. F. Ins. Co.* 124 Mass. 63, 26 Am. Rep. 647; *Chase* v. *Denny*, 130 Mass. 566; *Christmas* v. *Russell*, 81 U. S. 14 Wall. 69, 20 L. ed. 762; *Ford* v. *Garner*, 15 Ind. 298; *Rogers* v. *Hosack*, 18 Wend. 319; *Holt* v. *Bank of Augusta*, 13 Ga. 341; *Bromwell* v. *Turner*, 37 Ill. App. 561.

The contract of November 3, 1887, was not a valid contract, because procured by Glidden for the benefit of his firm when the company was insolvent and he the president thereof.

Beach v. *Miller*, 130 Ill. 170; *Atwater* v. *American Exch. Nat. Bank*, 40 Ill. App. 501; 1 Beach, Priv. Corp. § 241*b*.

Mr. **E. R. Jewett** for appellant Baltimore & Ohio R. Co.

Mr. **John S. Cook** for appellant Evan T. Ellicott.

Messrs. **Smith, Helmer & Moulton** for appellant Marcus A. Thompson.

Messrs. **Lynden Evans** and **Frederick Arnd,** for appellants, the trustees of Glidden & Curtis:

When the goods are consigned to a factor, and he makes advances on them, he has the right to sell them, and may, out of the proceeds, satisfy his lien.

2 Kent. Com. § 44, p. 642; *Zoit* v. *Millandon*, 4 Mart. N. S. 470.

The lien also extends to proceeds of the goods.

Hudson v. *Granger*, 5 Barn. & Ald. 27; *Keiser* v. *Topping*, 72 Ill. 226; *Jarvis* v. *Rogers*, 15 Mass. 389.

An agreement to pledge property to come into being makes the pledge attach immediately upon the property coming into being.

Macomber v. *Parker*, 14 Pick. 497; *Donald* v. *Hewitt*, 33 Ala. 534, 73 Am. Dec. 431; *Smith* v. *Atkins*, 18 Vt. 461; *Goodenow* v. *Dunn*, 21 Me. 86; *Ayers* v. *South Australian Bkg. Co.* L. R. 3 P. C. 548; *Wisner* v. *Ocumpaugh*, 71 N. Y. 113; *Coates* v. *Donnell*, 16 Jones & S. 46; *Barnard* v. *Norwich & W. R. Co.* 4 Cliff. 351; *Kirksey* v. *Means*, 42 Ala. 426; *Bibend* v. *Liverpool & L. F. & L. Ins. Co.* 30 Cal. 78.

On future property this lien is good against subsequent contract creditors of the lineor.

Jones, Liens, § 42; Jones, Chattel Mortgages, § 157; *Tedford* v. *Wilson*, 3 Head, 311; *Polk* v. *Foster*, 7 Baxt. 98; *Grange Warehouse Asso.* v. *Owen*, 86 Tenn. 355; *Read* v. *Mosby*, 5 L. R. A. 122, 87 Tenn. 759.

The pledgee does not lose his lien by permitting the pledgor to have the property for a special and limited purpose.

Cooper v. *Ray*, 47 Ill. 53; *Hutton* v. *Arnett*, 51 Ill. 198; *Langton* v. *Waring*, 18 C. B. N. S. 315; *Way* v. *Davidson*, 12 Gray, 465, 74 Am. Dec. 604.

Messrs. **Norton, Burley & Howell,** for appellee:

The order or draft in question operated as an equitable assignment, *pro tanto*, of the fund in the hands of the Pullman company from the time of its delivery. Notice to the drawee was not necessary to perfect the title of the bank as against any party to this cause.

3 Pomeroy, Eq. Jur. §§ 1280, 1281, and *notes; Pomeroy* v. *Manhattan L. Ins. Co.* 40 Ill. 398; *National Bank of America* v. *Indiana Bkg. Co.* 114 Ill. 483; *Phillips* v. *Edsall*, 127 Ill. 547.

The fact that the debt against which the draft was drawn was not then due and payable is immaterial.

3 Pomeroy, Eq. Jur. § 1283, and cases cited; *Anderson* v. *DeSoer*, 6 Gratt. 364. See also 1 Am. & Eng. Encyclop. Law, 830, 840; 2 Story, Eq. Jur. 13th ed. § 1044; 1 Daniel, Neg. Inst. 3d ed. § 23.

An insolvent corporation may deal with its creditors by making payment, etc.

Wait, Insolv. Corp. § 162; 2 Morawetz, Priv. Corp. §§ 802, 804; Cook, Stock & Stockholders, § 691; *Paulding* v. *Chrome Steel Co.* 94 N. Y. 334; *Dutcher* v. *Importers & T. Nat. Bank*, 59 N. Y. 12; *Reichwald* v. *Commercial Hotel Co.* 106 Ill. 439; *Ragland* v. *McFall*, 137 Ill. 81; *Glover* v. *Lee*, 140 Ill. 102; *Weber* v. *Mick*, 131 Ill. 526.

Bailey, J., delivered the opinion of the court:

On the 5th day of October, 1889, Pullman's Palace-Car Company, being a debtor of the Ohio & Western Coal & Iron Company, a corporation organized under the laws of the state of New York, in the sum of $31,695.63, filed its bill of interpleader in the circuit court of Cook county against the First National Bank of Columbus, Ohio, the trustees of the late firm of Glidden & Curtis, the Ohio & Western Coal & Iron Company, and James A. Hall, its assignee, and divers creditors of that corporation, who were seeking to reach the indebtedness in question by process of garnishment, praying to have these various claimants upon the fund in its hands brought into court, and required to interplead as to their respective interests and priorities. The defendants having appeared and answered, the cause was heard on pleadings and the master's report, and it was decreed that a proper case for an interpleader was presented; and, the complainant having paid into court the full amount of the indebtedness in question, the defendants were perpetually enjoined from proceeding further against it for the collection of the same, and it was ordered that the fund thus paid into court stands in lieu of the complainant's liability as garnishee or otherwise. The cause, as between the several defendants, being afterwards heard, it was adjudged and decreed that the claims of four of the attaching creditors, viz., those of Walter P. Warren, the Baltimore & Ohio Railroad Company, Evan T. Ellicott & Marcus A. Thompson, aggregating $22,771.97, were entitled to priority, and those claims, with interest thereon from the date of the decree were ordered to be paid in full; and it was further decreed that the First National Bank of Columbus was entitled to the residue of the fund after the payment in full of these four attaching creditors. From this decree the First National Bank of Columbus and the trustees of Glidden & Curtis appealed to the appellate court; and in that court the decree was reversed, and the cause was remanded to the circuit court, with directions to enter a decree giving priority to the claim of the bank, amounting to $16,676.79, and ordering that claim, with interest thereon from March 1, 1889, to be first paid in full, and ordering payment of the residue of the fund to the trustees of Glidden & Curtis. From the judgment of the appellate court the four attachment creditors and the trustees of Glidden & Curtis have appealed to this court.

The facts in relation to the claim of the First National Bank of Columbus, Ohio, as shown by the evidence, are substantially these: On February 8, 1889, and prior to that time, the trustees of the Ohio & Western Coal & Iron Company resided in Massachusetts, Maine, New York, and Pennsylvania, and one of their number, James A. Hall, who was also vice-president of the company, resided at Columbus, Ohio. John M. Glidden, the president, and George R. Chapman, the treasurer, resided and had their office at Boston, Mass., and Chester Griswold, the secretary, resided and had his office in the city of New York. The company had an office in New York City, where its corporate meetings were held, and it also had an office in Boston, where its principal financial business was transacted, and also one at Columbus, where its principal operative business was carried on, its mines and furnaces being all situated in Ohio. Books of account of the transactions in Ohio were kept at the Columbus office, and books of account were also kept at Boston. The representatives of the company residing at Columbus were Hall, the vice-president, and H. C. Stanwood, whose office or agency, as he was known and held out to the world, was that of assistant treasurer; and he had, ever since the organization of the company, which was then about six years, been performing the duties appropriate to that position, and had been recognized by the company in many ways as holding that office. It is now claimed, however, that no such office as assistant treasurer was provided for by the by-laws of the company, and that there is no record upon the books of the company of Stanwood's appointment to that office; but the evidence clearly warrants the conclusion that, from the first organization of the com-

pany down to the time of the transactions in question in this suit, he had actual charge of the financial affairs of the company at Columbus, and was, *de facto*, its treasurer at that place. In transacting its financial business in Ohio, the company, from the first, kept its bank account with the First National Bank of Columbus; the business with the bank being all transacted, on the part of the company, by Stanwood. All deposits were made by him, and all checks bore his signature, although a part of the checks seem to have been also countersigned by Hall, the vice-president, while others were signed by Stanwood alone. Among other financial transactions between the bank and the company, Stanwood drew, through the bank, a large number of drafts in favor of the company on Glidden & Curtis, of Boston, which were honored. In January, 1889, the company was indebted to the bank in the sum of $20,000 for money previously borrowed, and in renewal of which indebtedness it gave its two promissory notes for $10,000 each, one dated January 10, and the other January 12, 1889, and each payable thirty days after date, to the order of Glidden & Curtis, and indorsed by them. This loan was made at the earnest solicitation of Stanwood, and the business with the bank in relation to it was transacted by him. The loan seems to have been made principally upon the financial standing and credit of Glidden & Curtis, who were then reputed to be wealthy and responsible, the bank having declined to make the loan on the credit of the coal and iron company alone. On the night of February 8, 1889, the officers of the bank having learned that Glidden & Curtis had failed, and had made an assignment for the benefit of their creditors, and being alarmed about their security upon the notes, sent for Stanwood, who was the only officer of the company then in Ohio, and demanded further security from the company. No security was given that night, but, at about 9 o'clock the following morning, Stanwood executed and delivered to the bank the following instrument: "Columbus, Ohio, February 8, 1889. To the Pullman Palace-Car Company, Pullman, Ill.: Please pay to the First National Bank of Columbus, Ohio, or order, the sum of twenty thousand dollars of the money owing by you, and to become due to us on or about the 15th day of February and the 15th day of March, 1889, value received by us, and charge the same to our account. The Ohio & Western Coal & Iron Co., by H. C. Stanwood, Asst. Treasurer." Notice of the execution of this instrument was at once given to the Pullman Company by telegraph, and on February 11th it was presented to that company, and protested for nonacceptance; and on the 15th day of February, and again on the 15th day of March, it was presented, and protested for nonpayment. On February 9th, Thompson began his suit by attachment, in the circuit court of Cook county, against the coal and iron company, and caused the Pullman Company to be summoned as garnishee. This attachment was followed at different dates by those of the other attaching creditors, and on February 11th the coal and iron company made an assignment to James A. Hall, assignee; the deed of assignment being delivered to Hall, and filed for record in the probate court of Franklin county, Ohio.

The first proposition affecting the claim of the bank to priority, raised by counsel for the appellants, is that Stanwood had no authority to execute to the bank the instrument above set forth, and that such instrument therefore was ineffectual as an assignment to the bank of any portion of the fund in the hands of Pullman's Palace-Car Company. The question thus raised is one of fact to be determined from all the evidence, and it must be confessed that the testimony of the various witnesses, applicable to that question, is far from being harmonious. It is to be noticed, however, that both the circuit and the appellate court, after considering the evidence, have reached the conclusion that Stanwood was vested by the coal and iron company with competent authority to execute the order on its behalf. While, in cases in chancery, where, as in the present case, the evidence has not been taken orally in open court, in the presence of the chancellor, we are not concluded by the decision of the court below, but may examine and pass upon the evidence *de novo*, still some degree of weight is properly due to the concurring decisions of the two courts to whose judicial investigation the evidence in the case has already been subjected. We have nevertheless given the evidence an earnest and careful consideration, and, while it must be said that the question is not altogether free from doubt, we are inclined to concur with the conclusion reached by the courts below. The evidence in the case is very voluminous, the abstract of the record constituting a volume of over 540 printed pages. It is manifest, therefore, that any attempt on our part to give such an analysis of the evidence as will adequately show the grounds upon which our conclusion is based would involve an expenditure of time and space which, in view of the pressure of other duties, we can but ill afford, and which, after all, would subserve no useful purpose. It may be said, briefly, that it is clearly shown that, in his position of assistant treasurer, Stanwood had general control of the fiscal concerns of the company in Ohio, especially in the absence of Hall, the vice-president; and it appears that, at the time the instrument in question was executed, Hall had gone to New York to attend a corporate meeting, leaving the entire charge of the financial concerns of the company in Ohio in Stanwood's hands. Hall testifies that, as to financial matters,—matters in respect to loans and their payment,—Stanwood had always been authorized to act for the company; that, in the absence of the witness, Stanwood conducted the financial business of the company; and that witness had no recollection of having ever notified the bank of any limitation upon Stanwood's power to manage financial matters. On further examination he says that the particular part of the company's business at Columbus which Stanwood attended to was the money part; that he had charge of all matters of money at the Columbus office, including the ac-

counts at the bank; that he negotiated the $20,000 loan, and was in the habit of negotiating loans at Columbus; that he signed checks on the bank, which the witness countersigned while there, but that, when he was away, Stanwood drew checks without his countersigning them. Stanwood himself testified that the duties he performed as assistant treasurer were all the financial duties,—the entire business of the company, so far as it related to the disbursing of money, the collection of accounts, and the care of property under his charge; that he attended to the building of some 150 houses; that he bought the most of the supplies of all kinds, and had the general conduct of the business, up to the time Hall came to Ohio, which was in July, 1887, except the operation of the furnaces and coal mines; that he had charge of the financial business entirely, and of everything connected with that department; that he kept the accounts with the bank, looked after deposits, and drew the checks; that he negotiated the $20,000 loan, and also other loans; that on certain occasions he signed notes for the company, in pursuance of special directions for that purpose: that Hall, after coming to Columbus, had general supervision of the mines and furnaces, but had nothing whatever to do with the financial affairs of the company; that there was never a single transaction, of any sort or nature, connected with the financial department of the company, that anybody attended to, except himself, from the organization of the company to the date of its failure. John M. Glidden, the president of the company, testifies in cross-examination that, as he understands it, Stanwood managed the financial affairs of the company at Columbus generally and continuously for several years, ending at the time of the failure, in the capacity of assistant treasurer; that he was recognized by the officers of the company, and by its agents and employés and the public generally, as the assistant treasurer of the company; that witness himself recognized Stanwood as assistant treasurer of the company, and recalls no instance where he dissented from his acts as such. The foregoing is not, and is not intended to be, a complete statement of the evidence applicable to the question under consideration; but it is sufficient, we think, to show, that Stanwood, under the designation of "assistant treasurer," was a fiscal officer or agent of the coal and iron company, clothed with very broad and general powers. The fund in the hands of the Pullman Company consisted of money due and to become due for products of the coal mines of the coal and iron company; and it seems, therefore, to have properly pertained to the department of the financial business of that company, which was under the control and supervision of Stanwood. We are of the opinion, then, that in view of all the evidence it must be held that the appropriation of a portion of that fund to the satisfaction or securing of the $20,000 loan was within the scope of the powers conferred by the company upon him. Nor do we think it necessary, in order to sustain this view, to resort to the doctrine of estoppel, or to draw any distinction between the actual and the apparent scope of his authority as agent. The case does not rest, as it seems to us, upon proof of the acts of the company in holding him out as its agent possessing sufficient authority to enable him to execute on its behalf the instrument in question, but the evidence tends to establish an actual delegation of powers broad enough for that purpose.

It is next contended that the order upon the Pullman Company was only a partial assignment of the fund due or to become due to the drawer, and that as it was not accepted by the drawee it was ineffectual to pass the title thereto to the bank in whose favor the order was drawn. In this view we are unable to concur. While a part of a debt or chose in action is not assignable at law, it may be assigned in equity, and in such case a trust will be created in favor of the equitable assignee of the fund, and will constitute an equitable lien upon it. *Phillips* v. *Edsall*, 127 Ill. 535. On this question, Mr. Pomeroy, in his treatise on Equitable Jurisprudence, says: "Equity recognizes an interest in the fund, in the nature of equitable property, obtained through the assignment, or the order which operates as an assignment, and permits such interest to be enforced by an action, even though the debtor or depositary has not assented to the transfer. It is an established doctrine that an equitable assignment of a specific fund in the hands of a third person creates an equitable property in such fund." And again: "The agreement, direction, or order being treated in equity as an assignment, it is not necessary that the entire fund or debt should be assigned. The same doctrine applies to an equitable assignment of any definite part of a particular fund. The doctrine that the equitable assignee obtains, not simply a right of action against the depositary, mandatary, or debtor, but an equitable property in the fund itself, is carried out into all its legitimate consequences. Thus, the assignee may not only recover the money from the original depositary (the drawee), but may pursue it or its proceeds, under any change of form, as long as it can be certainly identified, into the hands of third persons who have acquired possession of it from the depositary, as volunteers, or with notice of the assignee's prior right. The fund, in this respect, resembles a fund impressed with a trust." 3 Pom. Eq. Jur. § 1280. See also *Pomeroy* v. *Manhattan L. Ins. Co.* 40 Ill. 398; *National Bank of America* v. *Indiana Bkg. Co.* 114 Ill. 483. Nor is it material that the fund upon which the draft is drawn is not due, in that it is not actually in being, if it exists potentially, for even in that case the order will operate as an equitable assignment of the fund as soon as it is acquired, and will create an interest in it which a court of equity will enforce. 3 Pom. Eq. Jur. § 1283.

It is further urged that the order in question contravenes the provisions of a statute of the state of New York in relation to corporations, and is therefore void. The Ohio & Western Coal & Iron Company was organized under a general statute of the state of New York, authorizing and providing for the formation of corporations for manufactur-

ing, mining, mechanical, or chemical purposes, passed February 17, 1848. That statute contains no provision prohibiting preferences by insolvent corporations. But there seems to be a general statute in force in that state in relation to corporations, passed in the year 1825, and which forms a chapter in the "Revised Statutes of New York passed in the years 1827 and 1828, and certain former acts which had not been revised." That statute contains a section which provides as follows: "Whenever any incorporated company shall have refused the payment of any of its notes, or other evidence of debt, *in specie*, or lawful money of the United States, it shall not be lawful for such company, or any of its officers, to assign or transfer any of the property or choses in action of such company, to any officer or stockholder of such company, directly or indirectly for the payment of any debt; and it shall not be lawful to make any transfer or assignment in contemplation of the insolvency of such company, to any person or persons whatever; and every such transfer and assignment to such person, stockholder, or other person, or in trust for them or their benefit, shall be utterly void." There can be no doubt that the coal and iron company, at the time the draft was drawn, was in contemplation of insolvency. On that very day, or the day before, a meeting of the trustees was held in the city of New York, at which Hall, the vice-president, was present, and at which it was determined that the company should make an assignment for the benefit of its creditors,—a step which was taken very shortly afterwards. If, then, the New York statute above quoted is to be enforced extraterritorially, the draft must be held to be void. Should it be so enforced? It is the charter alone which, by the law of comity, is recognized and enforced in other jurisdictions, and not the general legislation of the state in which the company is formed. The general laws and regulations of a state are intended to govern only within the limits of the state enacting them, and the state can have no power to give them extraterritorial force. Such provisions do not, as a rule, enter into contracts made within the state, if they are to be performed in another jurisdiction. It follows, therefore, that where a state statute is enacted for the enforcement of a local policy only it will not be presumed that such statutory provisions were intended by the state, or by the shareholders forming the corporation, to enter into the charter contract, and to regulate the company in its transactions outside of the state, and they will not affect the validity of the dealings of the company in foreign states. 2 Morawetz, Priv. Corp. § 967.

In *White* v. *Howard*, 38 Conn. 342, a question arose as to the power of a New York corporation to take a devise in the state of Connecticut, devises to corporations being forbidden by the New York statute of wills. The court, in sustaining the devise, said: "If the inability to take by devise arose out of a prohibitory clause in the charter, the conclusion contended for would be legal and logical. But the inability does not so arise. There is no prohibition in the charter. The inability is created by the New York statute of wills, expressly excepting corporations from taking by devise. Now this corporation brings with it from New York its charter, but it does not bring with it the New York statute of wills, and cannot bring it to be recognized as law within this jurisdiction. There is an obvious distinction between an incapacity to take, created by the statute of a state, which is local, and a prohibitory clause in a charter, which everywhere cleaves to the corporation." In *Ellsworth* v. *St. Louis, A. & T. H. R. Co.*, 98 N. Y. 553, the corporation in question was organized under the laws of Illinois, and the point in dispute was whether a provision in its charter prohibiting it from selling its bonds at less than 80 cents on a dollar would apply, as a statutory provision, to a sale made in the state of New York. In deciding this question in the negative, the court said: "There is nothing in the laws of New York which renders the contract illegal. Even if the charter of the defendant should be so construed as to contain prohibitions which would have rendered the contract illegal in Illinois, if made there, they do not have that effect in this state." In *Hoyt* v. *Shelden*, 3 Bosw. 267, the charter of a corporation created by the laws of New Jersey contained no prohibition upon the disposition of its property in case of insolvency. A general statute of the state, however, prohibited incorporated companies, after becoming insolvent or in contemplation of insolvency, from selling, assigning, or transferring any of their property or effects, and declared all such sales to be utterly null and void as against creditors. The question was as to whether the title of a citizen of New York, derived through a transfer of a portion of its property by such corporation, the transfer being made outside of New Jersey, was affected by such prohibition. The court, in deciding that question in the negative, held that the power of disposing of its property was one of the powers incident to corporate existence, and was not destroyed by insolvency, unless so expressly provided in the act of incorporation, and that a citizen of New York, dealing with a New Jersey corporation, might rely upon the act of incorporation, and was not chargeable with notice of the general laws of New Jersey restraining the powers of corporations. See also *National Bank of America* v. *Indiana Bkg. Co.* 114 Ill. 493; *Hoyt* v. *Thompson*, 19 N. Y. 207.

In view of these authorities, and of many others of like character which might be cited, we are of the opinion that the general statute of New York prohibiting the assignment or transfer of property by a corporation in contemplation of insolvency is only a part of the local law of that state, which New York corporations organized under the Act of 1848 do not carry with them when they go to other jurisdictions to do business, and that, having no extraterritorial force, it has no application to an assignment of a fund in Illinois executed in Ohio by a New York corporation. In *Starkweather* v. *American Bible Soc.*, 72 Ill. 50, 22 Am. Rep. 133, it was held that a New York corporation could not exercise a

power in this state which was denied to it by the general statutes of the state of its creation, and to that extent the rule in this state must be held to be in conflict with that laid down in *White* v. *Howard*, *supra*. We are aware of no decision in this state, however, which holds that the local statutes of another state, regulating the mode in which corporate powers shall be exercised, or determining the validity of corporate acts performed in the exercise of such powers, are to be given any extraterritorial effect.

But it is contended that, even if the draft in question is not affected by the New York statute, it should, under the circumstances, be held to be void on general principles of equity. The theory upon which this cotnention rests is that the assets of a corporation, the instant the corporation becomes insolvent, become a trust fund for the benefit of its creditors, and that the officers of the corporation, in possession of the corporate property, being trustees for all the creditors, cannot lawfully dispose of it otherwise than for the equal benefit of all the corporate creditors. In support of this view the case of *Rouse* v. *Merchant's Nat. Bank of Cincinnati*, 46 Ohio St. 493, 5 L. R. A. 378, is referred to; and this decision, among others, was read in evidence at the hearing for the purpose of showing, as a matter of fact, the conclusion adopted by the highest court of the state of Ohio in relation to the equitable rule contended for. It is there held that a corporation organized for profit under the laws of Ohio, after it has become insolvent and ceased to prosecute the business for which it was created, cannot, by giving some of its creditors mortgages to secure antecedent debts, without other consideration, create valid preferences in their behalf over other creditors, or over a general assignment thereafter made for the benefit of creditors. The court, in the opinion, recognizes the fact that the decisions on the question in the other states are conflicting, and admits that it is a matter of first impression in that court. In this state, however, where the fund assigned had its *situs*, where the drawee resided, and where the order, as the parties must have contemplated, was to be executed, a somewhat different rule prevails. The doctrine is recognized here that the property of an insolvent corporation is a trust fund, in such sense as precludes the directors and officers of the corporation from dealing with it in such manner as to secure preferences for themselves. *Roseboom* v. *Whittaker*, 133 Ill. 81; *Beach* v. *Miller*, 130 Ill. 162. But we have not gone so far as to hold that the mere insolvency of a corporation, *eo instanti*, deprived the directors and officers of the power to dispose of the corporate property, in good faith, by way of paying or securing corporate debts, even though the result may be to give certain creditors a preference over others. In *Reichwald* v. *Commercial Hotel Co.*, 106 Ill. 439, a corporation organized under the laws of Iowa, and doing business in this state, being insolvent, turned out a part of its property in payment of one of its creditors; and it was held that a corporation, like a natural person, in the absence of any positive law to the contrary, may turn out a part or the whole of its property in payment of its debts, and in so doing may prefer creditors, if done in good faith, and not for a fraudulent purpose. In *Ragland* v. *McFall*, 137 Ill. 81, the question arose between a judgment creditor of an insolvent corporation and a creditor to whom the corporation had turned out a portion of its property in payment of that creditor's claim; and such disposition of the corporate property was sustained, the decision in *Reichwald* v. *Commercial Hotel Co. supra*, being cited and approved. In *Glover* v. *Lee*, 140 Ill. 102, creditors of an insolvent Iowa corporation brought suit against it by attachment, and caused certain insurance companies to be summoned as garnishees. A creditor, to whom the insolvent corporation had assigned the policies of insurance sought to be reached by the garnishment proceeding, intervened, and set up title under such assignment; and this court, in affirming a judgment in favor of the intervener, said: "The mattress company had an undoubted right to pay any and all of its creditors any debt which it justly owed, or it might secure a creditor. Here the policies were in good faith transferred to the bank, a creditor, with the approval of the insurance companies, before any other creditor acquired any lien, or took any steps to reach the assets of the mattress company, and we are aware of no principle which would prevent the bank from securing its debt in the mode adopted." In Cook on Corporations the rule is laid down as follows: "Corporations, unless restricted by their charters, or by general statutes, may make assignments for the benefit of creditors to the same extent that individuals may. In making the assignment the corporation may make preferences for one or more creditors over others, or of one class of creditors over other classes. A preference by the directors, of themselves, is generally held to be fraudulent." Cook, Corp. § 691; and see authorities collected in *notes*. Our conclusion, then, is that the order drawn by Stanwood on the Pullman company in favor of the bank was valid, and that it vested in the bank a first lien upon the funds in the hands of the Pullman company, if, under the evidence, it can be held that that fund at the time belonged to the coal and iron company, and was subject to its disposition. And this brings us to a consideration of the claim of Glidden & Curtis, now represented by the trustees of that firm.

The contention is that Glidden & Curtis were the general selling agents of the coal and iron company, and as such had advanced to that company large sums of money, for which the company, at the time of its failure, was indebted to them in the sum of nearly $400,000, and that they had a first lien on the fund in the hands of the Pullman Company for the payment of that indebtedness. It appears that in March, 1887, the company, being in need of money, adopted a resolution authorizing its treasurer to execute a contract with Glidden & Curtis to advance money for the use of the company upon such terms as should be approved by certain officers of the company, and that it also at

the same time adopted a resolution appointing Glidden & Curtis "fiscal and general selling agents of the company." Glidden & Curtis thereupon loaned to the company $300,000, and took as security $400,000 of its bonds, with the option to purchase the bonds, within a certain time, at 75 cents on a dollar,—an option which was duly exercised. The indebtedness created by this loan, however, as it seems, forms no part of the indebtedness for which the lien is now claimed. Afterwards, on the 3d day of November, 1887, a written contract between the company and Glidden & Curtis was executed, the material portions of which were as follows: "Whereas, by a vote of the trustees of said company, the said firm of Glidden & Curtis were duly appointed fiscal and general selling agents of said corporation: Now, therefore, it is hereby agreed by and between the said corporation and the said firm that the said agency shall be carried on and conducted upon the following agreements and conditions, to the faithful performance of which they, the said corporation and the said firm, mutually bind themselves, each to the other, its successors and assigns, firmly by these presents. First. The said firm are to sell or supervise and control all sales of said corporation's articles and products, and they are to furnish advances on said corporation's products according to its needs, to such an extent as they shall consider themselves safely secured therefor, at current rates of interest and exchange; and they are to render accounts of sales monthly to said corporation, and charge their commissions at the rate of ten cents per ton on the sales of coal, and two and one-half per cent on sales of iron. Second. All articles and products of the said corporation are to be, and are hereby, consigned to said firm. Third. This contract is to continue for five years from the thirty-first day of October, 1887." This contract was executed on behalf of the corporation by James A. Hall, vice-president, and consent to its execution seems to have been given by a large majority of the stockholders, but it does not appear to have been authorized by the trustees of the corporation. Glidden & Curtis, after being appointed general selling agents, appointed William C. Wyman their agent at Chicago to sell coal. There is very considerable evidence, however, both direct and circumstantial, tending to show that Wyman acted also as agent of the coal and iron company. But the business of his agency seems to have been conducted substantially as follows: Coal was shipped by the company to him, or, as was most generally the case, directly to the parties to whom he had sold it, and he collected the money therefor, and remitted it to Glidden & Curtis. He had on his office door the following sign: "Ohio and Western Coal and Iron Company, Walter C. Wyman, Agent,"—and the name of the company was also printed on his letter heads. Where the coal was shipped directly to the purchaser, the only document issued to Wyman was an instrument called a "Manifest of Mine Shipments," made out by the employés of the coal and iron company at the mines, which was in the nature of a letter of advice, containing a statement of the date, nature, and amount of the shipment, the name of the railroad by which the shipment was made, the number of cars, and the name of the purchaser, who was therein designated as consignee, and the printed heading of which was as follows: "From the Ohio and Western Coal and Iron Company to Glidden & Curtis, General Selling Agents. Walter C. Wyman, Manager Sales Department. These instruments seem to have borne no signature. On the 26th day of November, 1888, the following agreement was entered into between the coal and iron company and the Pullman Company:

"Chicago, Ill., November 26, 1888. Pullman's Palace Car Company, Chicago, Ills.—Gentlemen: The Ohio & Western Coal & Iron Company, for convenience hereinafter called the, 'coal company,' hereby proposes to furnish you with coal of the kind and quality hereinafter mentioned, for steam and hammer shop purposes at your works at Pullman, Ills., until June 1st, 1889; the coal to be of the best Ohio XX Shawnee, uniform in quality, and free from dirt, stone, slate, and other impurities, and subject to inspection and approval of your representative at Pullman, at the following price, f. o. b. cars at Pullman Junction, Ills.: One and one-quarter (1¼) inch screened lump, three dollars ($3.00) per ton. Three-quarters (¾) inch screened lump, two dollars and ninety-five cents ($2.95) per ton. Screened nut, two dollars and sixty-five cents ($2.65) per ton. Payment to be made for the coal delivered in each month in cash on your regular pay day, namely, the 15th day of the second month following the deliveries. It is the intent and meaning of this agreement that the coal company shall at all times supply coal of proper quality, and in sufficient quantities, to fully meet your current requirements, and under all contingencies, and also for at least ten days beyond your current needs; and whenever it shall partially or wholly fail to do so, or whenever you shall have reason to believe it will fail to do so, then it is understood and agreed that you shall have the right, in anticipation of such failure, to purchase in the market the required quality and quantity of coal necessary for your use, and to charge to the coal company any sum that the cost of such coal is in excess of the price herein agreed upon, which the coal company agrees to pay you. It is also understood and agreed that the above prices shall also apply to all coal that the coal company has furnished you since the completion of the delivery of coal under contract between our respective companies dated November 7, 1887, and that the coal company shall refund to you the amount you have paid it in excess of the price above named during said period. It is further agreed that, in the event the freight rates on the coal furnished under this contract between the coal mines of this company and Pullman Junction shall at any time during the continuance of this agreement be less than $2.00 per ton of 2,000 lbs., this company will at once notify you of such fact; and from the date of such reduction, and so long as it may continue, you will be entitled to a credit on the

price of each ton of coal furnished equal to the difference between such reduced rate and the rate of $2.00 per ton. Your written acceptance of this proposition will make the contract mutually binding upon both companies hereto. Executed in duplicate. The Ohio and Western Coal and Iron Company, By W. C. Wyman.

"Approved: James A. Hall, Vice Pres't.

"Accepted: Pullman Palace Car Company, by George F. Brown, General Manager."

After the execution of this agreement the coal sold and delivered thereunder was shipped by the coal and iron company from its mines in Ohio to the Pullman company, at Pullman, Ill.,—the Pullman company, or one of its agents, being in all cases named as the consignee,—and the contract price was credited by that company, on its books, to the iron and coal company. The indebtedness thus created, prior to that in controversy here, seems to have been collected from the Pullman company by Wyman, and by him remitted to Glidden & Curtis. But, at the time the order in favor of the First National Bank of Columbus was drawn, no attempt so far as appears, had been made by Wyman to collect of the Pullman company the accounts for coal maturing February 15 and March 15, 1889; and the question is whether, under the facts proved, Glidden & Curtis had such a claim to or lien upon those accounts as precluded the coal and iron company from appropriating or assigning them for the purpose of paying or securing the $20,000 loan. The claim is now made that the form in which the instrument of November 26, 1888, above set forth, purporting to be an agreement between the coal and iron company and the Pullman company, was executed, was a mistake; that it was drawn up by the Pullman company, and that, when presented to Wyman to be executed, the typewritten signature of the coal and iron company was already at the bottom of it, and that Wyman hastily and unadvisedly executed the instrument by adding his own signature to that of the company, already typewritten, although it was his intention to execute it on behalf of Glidden & Curtis, and that it should be treated as the contract of Glidden & Curtis, and not that of the coal and iron company. It will be noticed that the mistake, if there was one, was not in the signature alone, but that it pervades the entire instrument. The coal and iron company is named and referred to throughout as one of the contracting parties, and Glidden & Curtis are not referred to, either as principals, factors, selling agents, or in any other relation; and their signature to the instrument, without further explanation, would have been unmeaning. Even if it were admissible to change the legal effect of a written instrument by parol evidence, as is attempted to be done, proof that there was a mistake in the mode of signing comes quite short of obviating the difficulties which the tenor of the instrument presents. To accomplish the result contended for, the entire agreement must be reformed, and that, too, in such a way as to make it an agreement between other parties; and, even if that could be done by parol, there is no evidence in the record, so far as we are advised, upon which such reformation could be based. We see no sufficient ground for holding that this instrument was not executed precisely as it was intended to be, and that, so far as it goes, it does not truly represent the transactions and relations of the parties to which it applies. If, then, Glidden & Curtis were entitled to or had a lien upon the money due from the Pullman Company for coal February 15 and March 15, 1889, upon what was that right based? We are unable to see how it could result from the terms of the contract of November 3, 1887, except so far as that contract must be deemed to recognize the lien which the common law gives to factors upon the goods consigned to them for sale, and upon the proceeds thereof when sold. The only provision in the contract having any bearing upon the question is the one by which Glidden & Curtis agreed "to furnish advances on said corporation's products, according to its needs, to such extent as they shall consider themselves safely secured therefor, at current rates of interest and exchange." How this security was to be effected, is not stated, but the contract provides for a consignment of the products of the coal and iron company to Glidden & Curtis for sale on commission, thus constituting them the factors of the company, and it is left to be inferred that the security intended is the one which the law gives to factors. In no other way does the contract assume to pledge the products of the coal and iron company as security for such advances as Glidden & Curtis might make under it.

This branch of the case, then, is reduced to the single inquiry whether, under the circumstances shown by the evidence, Glidden & Curtis were entitled to a factor's lien upon the particular coal sold to the Pullman company, and for which the indebtedness now in question accrued, or upon the proceeds of the coal after it was sold. Doubtless, if their agent had collected the money of the Pullman company, as he had the moneys due for previous sales, so as to get it into their possession, or that of their agent, before third parties had acquired liens upon it, they would have been entitled to hold it, and apply it in satisfaction of their advances to the coal and iron company. But that was not done. Were they entitled to a lien as factors? By the common law a factor has a general lien upon all the goods of his principal in his possession, and upon the price of such as are lawfully sold by him, and upon the securities received therefor, to secure the payment of the general balance of the accounts between himself and his principal, as well as for the advances, charges, and disbursements made upon or in reference to the particular goods. Mechem, Ag. § 1032; 3 Am. & Eng. Encyclop. Law, 333. But to obtain such lien the factor must have the goods lawfully in his possession. 3 Am. & Eng. Encyclop. Law, 335. Actual possession is of course sufficient, and delivery to the factor's own servant or agent will suffice. So, putting the goods upon the factor's dray to be drawn to his warehouse is a sufficient delivery. Mechem, Ag. § 1055. Some of

the authorities go further, and hold that where, before the goods have come into the possession of the factor, he has made advances upon them, or incurred liabilities in respect thereto, potential or constructive possession is sufficient. Bishop, Cont. § 1140. Thus, while some of the cases hold that his lien will not attach until the goods are actually in his possession, others maintain the doctrine that, where advances have been made in reliance upon a promise to subsequently consign the goods, a delivery to a common carrier consigned to the factor is sufficient. *Elliott* v. *Cox*, 48 Ga. 39; *Hardeman* v. *De Vaughn*, 49 Ga. 596; *Wade* v. *Hamilton*, 30 Ga. 450; Mechem, Ag. § 1035.

But no cases can be found, we think, which hold that the factor's lien can attach to goods which have never come into his actual possession, and have never been consigned to him, but which have been delivered or consigned by the owner directly to the purchaser. In such case the possession of the factor,—if, indeed, as to such goods, he can be called a factor,—is not actual, nor is it constructive or potential. The goods do not come into his possession or under his control, nor is it within the contemplation of the parties that they should do so. The principal yields possession directly to the purchaser, and no possession of the goods or control over them by the factor intervenes. Such seems to have been the precise condition of things in the present case. The coal was all consigned by the coal and iron company directly to the Pullman company or its agent, and it never came into either the actual or constructive possession of Glidden & Curtis. True, there was an agreement on the part of the coal and iron company to consign all of its products to them for sale, but a mere agreement to consign does not operate as an assignment. If the agreement was broken in this respect, Glidden & Curtis had their remedy for a breach of contract, but it was only through the actual performance of the agreement that their factor's lien could arise. If it be admitted that Wyman, in executing the contract of November 26, 1888, between the coal and iron company and the Pullman company, acted in fact as the agent of Glidden & Curtis, and that the contract is to be treated as though executed on behalf of the coal and iron company by Glidden & Curtis, their relations to the coal and iron company in executing that contract would seem to be that of brokers rather than that of factors. That contract clearly contemplated the consignment of the coal to be delivered under it directly to the Pullman company, and not to Glidden & Curtis, and the mode in which the contract was afterwards carried out as clearly indicates that such was the understanding of the parties. One of the essential differences between a factor and a broker is that, while the former has the possession of the goods to be sold, the latter has not; and it therefore follows that the common-law lien, which necessitates and grows out of possession, is given to the former, but is denied to the latter.

We are of the opinion, then, that under the facts, as shown by the evidence, Glidden & Curtis had no lien upon the fund in question in this suit. The lien of the bank became perfected by notice to the Pullman company before any other lien attached, and their claim must therefore be paid first, with interest. After its payment the residue of the fund should be distributed among the four attachment creditors above named in the order of priority fixed by the statute.

The decree of the Circuit Court and the judgment of the Appellate Court will be reversed, and the cause will be remanded to the circuit court, with directions to enter a decree as above stated.

MINNESOTA SUPREME COURT.

STATE of Minnesota, *ex rel.* W. H. CHILDS, Atty-Gen.,

v.

Village of MINNETONKA *et al.*

(.....Minn.....)

***1. "Any district, sections, or parts of sections which has been platted into lots and blocks, also the land adjacent thereto . . . said territory containing a resident population of not less than 175, may become incorporated as a village." Laws 1885, chap. 145. *Held*, that "lands adjacent thereto" include only those which lie so near the center or nucleus of population on the platted lands as to be somewhat suburban in their character, and to have some community of interest with the platted portion in the maintenance of a village government. The act does not authorize the incorporation**

*Headnotes by MITCHELL, *J.*

NOTE.—*Physical characteristics necessary to municipal organization.*

If the legislature itself undertakes to create a municipality the number of inhabitants and the size and character of the territory embraced in it are of very little importance.

For in the absence of special constitutional provisions the power of the legislature to fix the boundaries of municipalities is uncontrollable by the courts. Martin v. Dix, 52 Miss. 53, 24 Am. Rep. 661.

The legislature may fix any boundaries which it chooses. Norris v. Waco, 57 Tex. 635.

The legislature may alter and change boundaries at will. Galesburg v. Hawkinson, 75 Ill. 152.

The propriety of establishing a municipal corporation and of including within its boundaries a particular territory, is in general a political question for the legislative part of the government. If the course pursued in establishing a municipality is substantially such as is pointed out by the law the courts do not interfere. People v. Riverside, 70 Cal. 461.

The legislature might compel the acceptance of municipal organization at its pleasure regardless of the wishes of the people, or of the character of the

of large tracts of rural territory having no natural connection with any village and no adaptability to village purposes.

2. Ordered that a writ of ouster issue.

(June 15, 1894.)

PETITION for a writ of quo warranto to oust the defendant village from exercising the privileges of a municipal corporation. *Granted.*

The facts sufficiently appear in the opinion.

Mr. **Charles E. Vanderburgh,** for the State:

The Act of 1885, providing for the incorporation of villages, is unconstitutional, for the following reasons:

1. Because it delegates legislative functions to thirty electors, private citizens, residing upon the lands to be incorporated.

2. Because it is in violation of article 3 of the Constitution, which declares that the "powers of the government shall be divided into three distinct departments, legislative, executive and judicial; and no person belonging to or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the instances expressly provided in this constitution."

3. Because it violates section 1, article 9: "All taxes to be raised in this state shall be as nearly equal as may be; and all property on which taxes are to be levied, shall have a cash valuation, and be equalized and uniform throughout the state."

4. Because it violates section 13, article 1, of the Constitution, which declares that "private property shall not be taken for public use without just compensation therefor, first paid or secured."

5. Because it violates section 7, article 1, of the Constitution, which declares that "no person shall be deprived of life, liberty, or property, without due process of law."

A village is a political subdivision of the state, a municipal corporation, the creation of which has been intrusted by the people to the legislature. This power residing in the legislature, cannot, however, be delegated by it to another person or body.

State v. *Simons*, 32 Minn. 542.

The legislature cannot confer upon any body or person the power to determine what the law shall be.

Ibid.; *State* v. *Young*, 29 Minn. 474; Cooley, Const. Lim. § 117; *Shumway* v. *Bennett*, 29 Mich. 451.

In *Shumway* v. *Bennett*, *supra*, the village law was declared unconstitutional, because it delegated to private citizens the legislative function of fixing boundaries and compelling the incorporation of separate villages and inter-

---

inhabitants, or the territory for establishing useful manufactures. Paterson v. Society for Establishing Useful Manufactures, 24 N. J. L. 385.

But compulsory incorporation can come only from direct legislative action. People v. Bennett, 29 Mich. 451, 18 Am. Rep. 107.

And in Wisconsin there seems to be an inclination to restrict even the power of the legislature to some extent. For it has been held that a town cannot be made to consist of non-contiguous territory. Chicago & N. W. R. Co. v. Oconto, 50 Wis. 189, 36 Am. Rep. 840.

And that an unoccupied tract of country nowhere adjoining a village cannot be made part of it for the purpose of increasing the revenues of the village. Smith v. Sherry, 50 Wis. 210.

If the legislature provides a general law under which municipalities may incorporate then the municipalities are held somewhat strictly within the terms of the statute, or if such terms are not definite the courts will give the statute a reasonable construction and hold the incorporation within such construction.

It has been held that if the legislature had provided that cities proposing to incorporate under a general law should be empowered to embrace territory lying beyond their actual limits, it may be that in the clear abuse of the power it would be the duty of the courts to respect the legislative will and to hold the incorporation including such additional territory valid. But if no such power is granted the court has the power to determine whether or not the attempted incorporation is one within the authority granted by the legislature. Ewing v. State, 31 Tex. 177.

So the legislature may make the question of incorporation depend on the determination of some persons to be designated by it, whose finding will be conclusive on the courts. State v. Goowin, 69 Tex. 55.

But in the absence of such statutory provisions which are sufficient to control the question the courts will not countenance unreasonable attempts at incorporation.

A municipal corporation cannot cover territory already covered by a legal effective prior incorporation. State v. Winter Park, 25 Fla. 371; Taylor v. Fort Wayne, 47 Ind. 281.

A new corporation cannot be made to include a portion of an old one without direct legislative authority which shall extend to the restriction of the boundaries of the old one. Darby v. Sharon Hill, 112 Pa. 66.

So if the settlement has been recognized as a corporation by the legislature it must, under the New Jersey statutes, proceed in the way pointed out for incorporated villages to change their form in order to secure wider powers. State v. Van Valen, 56 N. J. L. 85.

The authority to incorporate has generally been applied to reach only those communities which have already become villages or dense settlements and which need nothing but corporate existence to complete their character. People v. Bennett, *supra*.

An attempted incorporation will be invalid if so much unoccupied land is embraced as to indicate a fraud on the law, or which cannot be fairly treated as part of the town. McClesky v. State, 4 Tex. Civ. App. 322.

Territory containing a town covering not more than two square miles of territory is not authorized to incorporate an area of twenty-eight square miles including farms, ranches, and unoccupied tracts of land. State v. Eidson, 7 L. R. A. 733, 76 Tex. 303.

A city covering two miles square cannot incorporate territory to the extent of ten miles square including farms and unoccupied country. Ewing v. State, *supra*; Mathews v. State, 82 Tex. 577.

In Pennsylvania the court has no authority to incorporate three square miles of territory containing two settlements, one of which opposes the incorporation, and also containing for the most part unoccupied farm land not connected by lines of buildings or improvements with the villages. *Re* Larksville, 7 Kulp, 84; *Re* Swoyersville, 5 Kulp, 191.

There may be in any township a small region

vening farms against consent and without any opportunity for hearing.

See also Dillon, Mun. Corp. 4th ed. § 183.

The legislature here proposes to put it in the power of a small hamlet to provide itself with conveniences, the greater portion of the expense of which it taxes upon farm lands which cannot possibly have any benefit from or connection with such conveniences; it amounts to a gift to the hamlet, and the imposition of a tax upon other territory for the purpose of raising the money necessary to purchase the gift. The law allowing such a condition of things is unconstitutional and void.

Sanborn v. *Rice County Comrs.* 9 Minn. 273.

The unplatted lands are not adjacent to the platted lands, and there is no one body of platted lands which, with the lands adjacent thereto, contains a resident population of one hundred and seventy-five persons.

Illinois Cent. R. Co. v. *Williams*, 27 Ill. 48; *Toledo, W. & W. R. Co.* v. *Spangler*, 71 Ill. 568; *Smith* v. *Sherry*, 50 Wis. 210; *Enterprise* v. *State*, 29 Fla. 128; Dillon, Mun. Corp. 4th ed. § 183.

As used in the act, the word "adjacent" has a well known and clearly defined meaning. It means "lying close, bordering upon, or adjoining."

People v. *Schermerhorn*, 19 Barb. 540; *Re Municipality No. 2 for Opening of Roffignac Street*, 7 La. Ann. 76; *Continental Imp. Co.* v. *Phelps*, 47 Mich. 299; *Re Little Meadows*, 28 Pa. 256; *Re West Philadelphia*, 5 Watts & S. 281; *Vestal* v. *Little Rock*, 11 L. R. A. 778, 54 Ark. 321.

The organization was void, because the statute was not complied with.

Potter's Dwar. Stat. 224; *Corwin* v. *Merritt*, 3 Barb. 341; *People* v. *Brooklyn*, 22 Barb. 404; *Sherman* v. *Dodge*, 6 Johns. Ch. 107, 2 L. ed. 69.

Where the state is proceeding against a *de facto* municipal corporation by quo warranto, and the respondent admits that it is exercising a municipal franchise, and claims the right to do so, the burden rests upon it to show a grant of power, and that it has brought itself within the prescribed legislative conditions.

State v. *Parker*, 25 Minn. 219; High, Extr. Legal Rem. § 712; *State* v. *Sharp*, 27 Minn. 39; *State* v. *McReynolds*, 61 Mo. 211.

Under general laws, "the authority to incorporate is usually restricted to cases in which communities more or less dense and populous already exist, which require a corporate character to exercise the powers of local government."

Where the legislature exercises the power by direct legislation, it may probably include such lands as it deems proper within the limits of a municipal corporation; but where the power is delegated it is usually restricted to the populous districts and lands immediately contiguous.

---

densely populated with more people than all the rest. Any question on which they united could be carried by their votes at a township election; but it would be tyrannical to allow them to determine for themselves what property should be made tributary to their local interests in which the rest of the town had no concern. People v. Bennett, *supra*.

There can be no incorporation of a tract of country one and three-fourths miles square, some of the lines of which run through a wilderness, where it is not shown what the number of inhabitants is. *Re* Little Meadows, 28 Pa. 256, 35 Pa. 336.

Under the statute permitting incorporation of villages containing 300 inhabitants, to make up that number it is not permissible to include two distinct collections of houses with a tract of farm land lying between them. *Re* West Philadelphia, 5 Watts & S. 281.

In Osgood v. Clark, 26 N. H. 307, it was held that under the New Hampshire statutes the whole village must be included in the incorporation.

The legislature cannot give municipal corporations the power to arbitrarily fix its own limit so as to absorb so much of the property and so many of the people of the county as it may suit their wishes to make subject to their taxation and ordinances. Prince George's County Comrs. v. Bladensburg, 51 Md. 465.

The inhabitants of a hamlet, village, or town, recognized by the Florida statutes as a community of persons authorized to form a municipal government, include persons living on contiguous territory, and an attempt to incorporate two distinct detached tracts of land as corporate territory under one government is unauthorized and void. Enterprise v. State, 29 Fla. 128.

In Ashley v. Calliope, 71 Iowa, 466, it was held that if a village incorporates territory two miles long by a mile wide, and a rival village afterwards springs up in a portion of the territory so included and the interests of the villages, whose centers are a mile apart, are antagonistic, and the land lying between them is not platted, a severance of the two shall be granted upon the petition of the inhabitants of the second village.

In People v. Bennett, 29 Mich. 451, 18 Am. Rep. 107, where a hamlet sought to incorporate with itself a hamlet a mile away and about one thousand acres of farm land, the court held that the law which permitted them to determine absolutely what the size of the municipality would be and what it would include, was void.

Under the New York statutes, to entitle a village to incorporate there must be at least 300 inhabitants, and if it contains more than one square mile of territory there must be 300 additional for each additional square mile or fraction thereof. *Re* Elba, 30 Hun, 543.

The Florida statutes provide for reducing the territory of a municipality if there is included in it an undue amount of vacant farm land. Jacksonville v. L'Engle, 20 Fla. 344.

The extent and character of the land are not per se controlling objections if the persons to be affected unite in the petition. *Re* Blooming Valley, 56 Pa. 66.

There is no designation as to number of inhabitants required under the Pennsylvania statutes passed in 1851 and 1863. *Re* Sewickley, 38 Pa. 80.

Three centers of population may be incorporated into one borough if they virtually form but one village connected by three main highways and the intervening lands are not used exclusively for farm purposes but some of them are already divided into building lots. *Re* Yeadon, 3 Pa. Dist. R. 669.

A ravine dividing two centers of population is not such a natural barrier as to prevent including both in one village, if the inhabitants of both demand it, and if such action will not remove part of the territory from its natural place as a part of some other municipality. *Re* Edgewood, 130 Pa. 348.

An Indian reservation may be included in the boundaries of a town. Schriber v. Langlade, 66 Wis. 618. H. P. F.

15 Am. & Eng. Encyclop. Law, 1011.

Such general legislation must receive a strict construction; and any ambiguity or doubt arising out of the terms used by the legislature must be construed against the corporation.

Boone, Corp. § 25.

The petitioners cannot arbitrarily fix boundaries, and in case the boundaries are clearly unwarranted or unreasonable, there is a departure from the statute, and an abuse of the incorporating power. No franchise passes, and the proceedings are void.

The petitioners fix the boundaries, and the county commissioners have nothing to do with that matter. They can determine nothing which the legislature has not authorized them to do.

Ewing v. *State*, 81 Tex. 172.

The course pursued must be such as is pointed out by the statute.

People v. *Riverside*, 70 Cal. 463.

The word "adjacent" in the connection found in the statute, is used in the obvious sense of contiguous and adjoining in—

Re Camp Hill, 142 Pa. 511.

There can be no inflexible rule to determine when the incorporated territory is unreasonable in extent; that will depend upon the facts of each case.

State v. *Eidson*, 7 L. R. A. 733, 76 Tex. 303; *Ewing* v. *State*, 81 Tex. 173.

The question of boundaries is jurisdictional in its nature.

Page v. *Los Angeles County Suprs.* 85 Cal. 54; *People* v. *Riverside*, 66 Cal. 290.

In a case of a clear abuse of the power to fix the corporate limits, in an attempt to incorporate under the general law, the court will not hesitate to annul the proceedings.

Vestal v. *Little Rock*, 11 L. R. A. 778, 54 Ark. 321; *Ewing* v. *State*, 81 Tex. 177; *State* v. *Baird*, 79 Tex. 64; *People* v. *Riverside*, *supra*.

Messrs. **H. W. Childs**, *Atty-Gen.*, **Rea, Hubachek & Healy** and **A. D. Smith** also for the State.

Messrs. **Young, Fish & Dickinson** and **Hale, Morgan & Montgomery**, for respondents:

This act has been before the court upon various points, in at least the following cases: *State* v. *Cornwall*, 35 Minn. 176; *State* v. *Spaude*, 37 Minn. 322; *Bradish* v. *Lucken*, 38 Minn. 186; *Stemper* v. *Higgins*, 38 Minn. 222; *Baldwin* v. *Robinson*, 39 Minn. 244; *Bradley* v. *West Duluth*, 45 Minn. 4; *St. James* v. *Hingtgen*, 47 Minn. 521.

Many cases have also been reported, to which such villages were parties, and in which public and private rights have been determined.

Wayzata v. *Great Northern R. Co.* 50 Minn. 438; *Buffalo* v. *Harling*, Id. 551.

Considering these frequent interpretations, the extent of such litigation and the very large number of villages now existing under the act, it would at this late day be as surprising as disastrous to destroy the legislative foundation upon which all such villages stand.

The legislature may, in the exercise of its undoubted power to create village corporations, leave it to the people immediately concerned, and to the local authorities, to determine for themselves, under specified conditions and on proper terms, whether territory of their selection shall be formed into such corporation or not.

The acceptance or rejection of city charters, the location of county seats, the division of counties, towns, and school districts and many local concerns of similar character, have habitually been made to depend upon a vote of the resident electors.

3 Am. & Eng. Encyclop. Law, 698; *State* v. *Hennepin County Dist. Ct.* 33 Minn. 235; Cooley, Const. Lim. § 141; 1 Dillon, Mun. Corp. § 44; *State* v. *Cooke*, 24 Minn. 247, 31 Am. Rep. 344.

In the case at bar, no power to legislate is delegated.

1 Dillon, Mun. Corp. § 41.

The term "adjacent" is not restrictive, but the contrary. It is not a measure of space or distance.

United States v. *Northern Pac. R. Co.* 29 Alb. L. J. 24.

As the corporators have a special and peculiar interest in the question whether they shall originally be or afterwards remain incorporated at all or not, and as the burdens of municipal government must rest upon their shoulders, and especially as by becoming incorporated they are held, in law, to undertake to discharge the duties the charter imposes, it seems eminently proper that their decision should be conclusive, unless for strong reasons of state policy or local necessity it should seem important for the state to overrule the opinion of the local majority.

Cooley, Const. Lim. *118.

Whether cities, towns, or villages should be incorporated, and, if incorporated, whether enlarged or contracted, in boundaries, presents no question of law or fact for judicial determination.

Galesburg v. *Hawkinson*, 75 Ill. 157.

Mitchell, J., delivered the opinion of the court:

It is conceded that the respondent exists, if at all, by virtue of the petition and other exhibits attached to the information, and purporting to be proceedings under Laws 1885, chap. 145, entitled "An act to provide for the incorporation of villages," etc. The language of the statute is: "Any district, sections, or parts of sections which has been platted into lots and blocks, also the lands adjacent thereto, . . . said territory containing a resident population of not less than 175, may become incorporated as a village." The territory claimed to have been incorporated as the village of Minnetonka is that inclosed in blue pencil lines on the map annexed to the information. It lies between the western boundary of the city of Minneapolis and the eastern shore of Lake Minnetonka, and contains nearly 35 square miles, being nearly equal in area to a full government township. Within this territory there were, at the time of its alleged incorporation, 17 or more tracts which had been platted, as indicated on the map, into lots and blocks, but these were in no way connected, but were separated, each from the other, by quite an extent of farm or uncultivated lands; and one peculiarity of the petition is that it does

not indicate which of these numerous plats was to be the nucleus of the proposed village. Many of these platted tracts are entirely vacant and uninhabited, and on most of the others there are only a very few permanent inhabitants, not sufficient to constitute a "village," in the popular and ordinary sense of the word. The only one which has inhabitants enough to constitute any considerable nucleus of either business or population is "Minnetonka Mills," situated on section 15. This contains about twenty families, and a population variously estimated from 60 to 105, and, together with the whole of sections 14 and 15, contains a population of only about 120. There are several post-offices, and as many as eight railway stations, within the boundaries of the alleged village. There is a considerable number of summer cottages and boarding houses along the shore of Lake Minnetonka, but these are mainly occupied by temporary summer visitors, who have no business or other relations with "Minnetonka Mills" during their sojourn. The northwesterly part of the territory is naturally tributary to the considerable village of Wayzata, situated just outside of the respondent village; while the southwesterly portion is in like manner tributary to the village of West Minneapolis, just outside its east boundary. There are 23 sections, including the south 10, within the boundaries of the corporation, which contain neither platted lands nor collections of houses in the nature of villages. The greater part of the resident population is strictly rural or agricultural, and the greater part of its territory consists of either wild lands or cultivated farms, of which there are about 150. It is apparent that this large territory, essentially rural, has no fitness for village government, and absolutely no community of interest in respect to the purposes for which such a government is designed.

The validity of respondent's incorporation is assailed on the grounds (1) that the act is unconstitutional; (2) that the act does not authorize the incorporation of such territory into a village. The point made against the validity of the act is that the legislature has neither itself determined how much or what character of land shall be included in a village, nor delegated the power to do so to any proper subordinate official body, but has left it wholly to the arbitrary determination of any 30 private citizens who may sign the petition, subject only to the conditions that the territory contains a population of 175, and that there be somewhere within its boundaries a tract of land platted into lots and blocks, and that the majority of the electors, within the territory whose boundaries are thus arbitrarily fixed by the petitioners, vote in favor of incorporation. It would be difficult to sustain the act if the word "adjacent," as used in the third section, is to be given the meaning contended for by the respondent, for under such a construction it would be left to the petitioners, subject only to the above limitations, to arbitrarily determine how much and what character of territory should be included in the proposed village. They might include a rural territory 50 or 100 miles square, provided "they did not skip over any as they advanced." But clearly this was not the intention of the legislature. The purpose evidently was to authorize the incorporation of "villages," in the ordinary and popular sense, and not to clothe large rural districts with extended municipal powers, or subject them to special municipal taxation for purposes for which they were wholly unsuited. A "village" means an assemblage of houses, less than a town or city, but nevertheless urban or semiurban in its character; and the object of the law was to give these aggregations of people in a comparatively small territory greater powers of self-government and of enacting police regulations than are given to rural communities under the township laws. The law evidently contemplates, as a fundamental condition to a village organization, a compact center or nucleus of population on platted lands; and, in view of the expressed purposes of the act, it is also clear that by the term "lands adjacent thereto" is meant only those lands lying so near and in such close proximity to the platted portion as to be suburban in their character, and to have some unity of interest with the platted portion in the maintenance of a village government. It was never designed that remote territory, having no natural connection with the village, and no adaptability to village purposes, should be included. Whether the word "adjacent" is to be given a more limited and definite meaning of universal application, or whether, as is my own impression, there is no inflexible rule, except the general one already laid down, as to what lands are adjacent, and that each case will depend somewhat on its own particular facts, it is not necessary to consider in the present case. There is no difficulty in determining, as a matter of law, that this territory is not "adjacent," within any meaning of the word, and that its attempted incorporation into a village was wholly unauthorized by the act.

Let a writ of ouster issue.

Buck and **Canty**, *JJ.*, took no part.

STATE of Minnesota, *Respt.*,
v.
Frank S. HOSKINS, *Appt.*

STATE of Minnesota, *Respt.*,
v.
Dow S. SMITH, *Appt.*

(.....Minn.....)

Laws 1893, chap. 63, entitled "An act to compel street railway companies to protect certain of their employés from the inclemency of the weather," is constitutional.

*Headnote by GILFILLAN, *Ch. J.*

NOTE.—*Constitutionality of laws to secure safety and comfort of employés.*

In the case of STATE v. HOSKINS the court holds that this act to protect street railway employés is not invalid on the ground of class legislation, that

See also 26 L. R. A. 317; 47 L. R. A. 52.

(June 23, 1894.)

APPEAL by defendant from a judgment of the Municipal Court of St. Paul convicting him of violating the provisions of the statute requiring street railway companies to protect their employés from the inclemency of the weather. *Affirmed.*

APPEAL by defendant from a judgment of the Municipal Court of Minneapolis convicting him of violating the provisions of the statute requiring street railway companies to protect their employés against the inclemency of the weather. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Munn, Boyeson & Thygeson** for appellant Hoskins.

Messrs. **Koon, Whelan & Bennett** for appellant Smith.

Messrs. **H. W. Childs,** *Atty-Gen.*, **Frank M. Nye,** and **Pierce Butler** for the state.

Gilfillan, *Ch. J.*, delivered the opinion of the court:

In these two cases the validity of Laws 1893, chap. 63, entitled "An act to compel street railway companies to protect certain of their employés from the inclemency of the weather," is called in question. That act requires of street-railway companies operating electric, cable, or steam cars, requiring the constant service of persons on any part of the cars except the rear platform, to provide each car with an inclosure, constructed of wood, iron, and glass, or similar suitable material, sufficient to protect such employés from exposure to the inclemency of the weather, but not so as to obstruct the vision of the person operating the car, at all times between November 1st and April 1st in each year. What are called "trailing cars" are excluded from this requirement, so that it applies only to cars on which the motive power is operated or controlled. The law was passed with reference to the fact that the man operating or controlling the motive power of such cars was required to stand where his person was almost wholly exposed to cold, storm, and wind, having but little protection except such as the clothing affords. The act is assailed as unconstitutional, on the grounds—First. That it is not an exercise of the police power of the state. Second. It is class legislation. Third. It impairs the obligation of a contract. Fourth. It interferes with the liberty of contract between street-railway companies and their employés. Fifth. It imposes an excessive fine.

It is stipulated as a fact, what everybody knows, that electric cars are run at a rate of speed of from four to fifteen miles an hour, and at an average rate of between eight and nine miles an hour. Any one acquainted with the extreme cold of much of the weather in this climate between the 1st of November and the 1st of April, and who knows, as everybody does, that the motorman on an electric car is obliged to stand in one place, always on the alert, his whole attention given to the means of controlling the motive power and the brake, and to looking out ahead, and unable, with due regard to his duties, to give attention to protecting himself from the cold, must appreciate that, when going at the rate of eight or nine miles an hour, perhaps against a head wind, and with the mercury below zero, the position of the motorman is one not merely of discomfort, but of actual danger to health, and sometimes to life, and the tendency of which is to disable him to some extent to perform his duties in the way that care to safety of his passengers and of travelers on the streets requires. It has never been questioned that the police power of the state extends to regulating the use of dangerous machinery, with a view to protecting, not only others, but those who are employed to use it; and if it be conceded, as it must be, that the state may intervene by regulations in such a case, we do not see why it may not in such a case as this. The act is within the police power. When a subject is within that power, the extent to which it shall be exercised, and the regulations to effect the desired end, are generally wholly in the discretion of the legislature. The legislature might in this case have required the use of the prescribed inclosure only at such times when the cold reached a certain degree, or when storms prevailed, but it was thought fit to make sure of the result aimed at by covering the time of year when extreme cold and bitter storms may occur at any time; and that was within its exclusive province.

The objection that this is class legislation is based on the fact that the act is confined to street-cars propelled by cable, steam, or

---

the care and control of the cars by the employés, allowing protection from the weather, is different with cars propelled by motors as distinguished from those drawn by horses; and it is further held not to impair the obligation of the contract, where the contract only required cars of the best modern style and construction; on the ground that this contract is held to be subservient to the police power of the state and there is nothing in the act showing that the state intended to yield up the police power.

A great many states have laws affecting employés and workingmen, as factory inspection laws, mining safety acts, fire escapes and the like; but the decisions regarding the validity of these acts are very few. It seems to be admitted that where the state has passed a law for the safety and health of employés that is reasonable, such laws have been generally unchallenged as regards their validity

The Pennsylvania Act of March 3, 1871, for ventilation of coal mines, is constitutional as it is within the police power of the state and only means that the operators of coal mines shall so work them as not to injure the health nor endanger the lives of employés. Com. v. Bonnell, Jr. 8 Phila. 534.

The Illinois Act of May 28, 1879, entitled miners providing for escapement shafts, was passed in obedience to Ill. Const., art. 4, § 29, and was for the health and safety of employés and not for the benefit of owners. Loose v. People, 11 Ill. App. 445.

But in *Re* Jacobs, 98 N. Y. 98, 50 Am. Rep. 638, it was held that the New York Act, Laws 1884, chap. 272, prohibiting the manufacture of cigars and the preparation of tobacco in any form in tenement houses in certain cases was unconstitutional as not within the police power, and was not made for the health and safety of employés and was not a health law. L. T.

electricity, and does not include street-cars drawn by mules and horses, or carriages or wagons; and it is assumed that here is an attempt at purely arbitrary classification for the purpose of the act. The evil sought to be remedied does not exist in case of the slowly going mule or horse car, or carriage or wagon, to the same degree as in the case of cable, electric, or steam cars. But, where an evil exists in a variety of cases, it is a sufficient ground for classification in legislating, so as to include some and exclude others, that in the former the evil can be remedied, while in the latter it cannot be. The man in control of the cable, electric, or steam railway car may be boxed in without impairing his power of control in the slightest degree; but to box in the driver of a horse or mule car, or of a stagecoach or carriage or wagon, separating him from his animals, while of course it could be done, would bring about greater evils than those sought to be remedied. The difference in this respect between cars included in this act and those not included is such as to justify difference in legislating.

The claim that the act impairs the obligation of a contract is based on the fact that in each case the railway company had a contract with the city, made before the passage of the act, in which the former bound itself to run cars of "the best modern style and construction," and this act requires something in addition thereto. We need only say of that, where parties contract on matters within the police power of the state, they do so subject to the exercise of that power whenever the legislature chooses to exercise it. If one contract with the state or a municipal corporation, acting under authority of the state, even if it were conceded that the legislature can, by contract or by giving authority to make a contract, bind the state not to exercise the police power, the legislative intent to do so would have to appear unmistakably. There is nothing to suggest such intent in the charter of either city.

What we have said on the third point made by appellants applies with equal force to the fourth.

The act imposes a fine of not less than $50, nor more than $100, for a violation of the law, and makes each day that cars shall be run without complying with the law a separate offense. A fine of from $50 to $100 could not be called excessive. It is true the party may, by repeatedly committing the offense, add up a large aggregate of fines; so might the offender against any other law,—the law against larceny or embezzlement, or any other; but that would not make the punishment excessive.

Judgments affirmed.

Collins and **Buck**, *JJ.*, took no part in the decision.

DISTRICT OF COLUMBIA COURT OF APPEALS.

William W. AVERELL
v.
SECOND NATIONAL BANK OF WASHINGTON, *Appt.*

(.....D. C. App.....)

1. **Testimony that if a post-dated check had been presented during business hours it would not have been received** as a deposit, is not admissible upon the question whether or not when presented after business hours the bank agreed to apply to its payment any funds standing to the drawer's credit when it became due and hold them subject to the check of the holder.

2. **One who goes into a bank after business hours,** and finds in a room used for the transaction of business after usual hours the paying teller of such bank, who is the only officer with whom he is acquainted, and deposits with such teller for collection a post-dated check upon such bank upon the teller's promise to hold the proceeds subject to his check, the transaction being substantially in the presence of the cashier though he is separated by a wire partition, is entitled to hold the bank liable,—especially where such teller has, to the knowledge of the cashier, occasionally acted as receiving teller, and the depositor is not aware of any limitations upon his authority.

3. **A bank which receives a post-dated check upon itself for collection,** under a promise to hold the proceeds subject to the check of the depositor, is liable to the latter where, when the bank opens on the day of the date of such check, the drawer has funds sufficient to discharge the debt, although at the closing hour on such day the account of the drawer is overdrawn.

(March 5, 1894.)

APPEAL by defendant from a judgment of a Special Term of the Supreme Court of the District of Columbia in favor of plaintiff, in an action for money had and received. *Affirmed.*

The facts are stated in the opinion.

Mr. **W. F. Mattingly**, for appellant:

There is no privity of contract between the

NOTE.—The above case is peculiar in the fact that the check deposited with the drawee bank was post-dated and not yet due as well as in the fact that the transaction was after banking hours, but these facts do not seem to have been particularly considered. Whether such a deposit of a check with the bank on which it is drawn be regarded in any case as a deposit for collection or as a deposit with a conditional acceptance and credit to be charged back if not paid, is a question which does not seem to be very material although in some of the cases cited above the transaction is spoken of as a deposit for collection, while in others it is regarded as a deposit for credit or payment. The important point is that the bank must regard it as paid by the first funds in its possession which may be applied thereon.

As to indorsement of a check "for deposit," see *note* to Ditch v. Western Nat. Bank of Baltimore (Md.) 23 L. R. A. 164.

holder of a check and the bank on which it is drawn. The bank owes no duty and is under no obligation to the holder, and he cannot sue the bank for refusing payment in the absence of proof that the check was accepted by the bank or charged against the drawer.

National Bank of the Republic v. *Millard*, 77 U. S. 10 Wall. 152, 19 L. ed. 897; *First Nat. Bank of Washington* v. *Whitman*, 94 U. S. 343, 24 L. ed. 229.

Drinkard, the paying teller, was the agent of the plaintiff and not of the bank. The check might as well have been left with the janitor or any other employé of the bank. No banking corporation will be safe if such acts could be construed an acceptance of commercial paper by a bank.

Morrow v. *James*, 3 Mackey, 27, 4 Mackey, 59; Morse, Banks & Banking, § 174*a*; *Thatcher* v. *Bank of the State of New York*, 5 Sandf. 122; *Manhattan Co.* v. *Lydig*, 4 Johns. 377, 4 Am. Dec. 289; *Clarke Nat. Bank* v. *Bank of Albion*, 52 Barb. 592; *Pickle* v. *Muse*, 7 L. R. A. 93, 88 Tenn. 380; *First Nat. Bank of Lyons* v. *Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181; *Security Bank of New York* v. *National Bank of the Republic*, 67 N. Y. 458, 23 Am. Rep. 129; *Bullard* v. *Randall*, 1 Gray, 605, 61 Am. Dec. 433; *Wyman* v. *Hallowell Bank*, 14 Mass. 58, 7 Am. Rep. 194; *Terrell* v. *Branch Bank at Mobile*, 12 Ala. 502; *State* v. *Commercial Bank of Manchester*, 6 Smedes & M. 218, 45 Am. Dec. 280; *Franklin Bank* v. *Steward*, 37 Me. 519.

A bank has the undoubted right to reject or accept a depositor.

Morse, Banks & Banking, § 178.

There can be no such thing as an acceptance of a post-dated check.

Morse, Banks & Banking, § 389*c*.

Messrs. **A. A. Birney** and **E. A. Newman**, for appellee:

The question is, Was Mr. Drinkard acting within the apparent scope of his agency, and did General Averell have the right to believe him empowered to do what he did?

And this is the rule even though the act is in fact fraudulent, provided the customer has no knowledge of the fraud, but is himself dealing bona fide, and believes the official to be dealing in like good faith in the business of his principal.

Morse, Banks & Banking, p. 205.

Those dealing with a bank in good faith have a right to presume integrity on the part of its officers when acting within the apparent sphere of their duties, and the bank is bound accordingly.

Merchants Nat. Bank of Boston v. *State Nat. Bank of Boston*, 77 U. S. 10 Wall. 650, 19 L. ed. 1020; *Farmers & M. Bank of Kent County* v. *Butchers & Drovers Bank*, 16 N. Y. 125, 69 Am. Dec. 678; *Barnes* v. *Ontario Bank*, 19 N. Y. 156; *East River Nat. Bank* v. *Gove*, 57 N. Y. 597; *Hotchkiss* v. *Artisans Bank*, 42 Barb. 517; *Munn* v. *Burch*, 25 Ill. 35; *Lloyd* v. *West Branch Bank*, 15 Pa. 172, 53 Am. Dec. 581.

In the case of a deposit of a check drawn upon itself the bank becomes at once the debtor of the depositor, and the title to the deposit passes to the bank.

Oddie v. *National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160; *Tinkham* v. *Heyworth*, 31 Ill. 519.

If at the time the holder hands in the check he demands to have it placed to his credit and is informed that it shall be done, or if he holds any other species of conversation which practically amounts to demanding and receiving a promise of a transfer of credit as equivalent to an actual payment, the effect will be the same as if he had received his money in cash, and the bank's indebtedness to him for the amount will be equally fixed and irrevocable.

First Nat. Bank of Cincinnati v. *Burkhardt*, 100 U. S. 686, 25 L. ed. 766.

In the case of checks not good when presented, either for lack of funds or because the check is not due, the bank, if it receives the check for collection from itself, will be bound so soon as the check is payable and there are funds to meet it, and the depositor may sue as for money had and received.

Bank of New Hanover v. *Kenan*, 76 N. C. 345; *Kilsby* v. *Williams*, 5 Barn. & Ald. 815; Morse, Banks & Banking, p. 321; *Oddie* v. *National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160; *National Gold Bank & Trust Co.* v. *McDonald*, 51 Cal. 64; *City Nat. Bank of Selma* v. *Burns*, 68 Ala. 275, 44 Am. Rep. 138; *First Nat. Bank of Cincinnati* v. *Burkhardt*, *supra*.

The evidence showed that Mr. Drinkard had repeatedly performed acts like that in question, with the knowledge and acquiescence of the cashier. This was enough to entitle the court to leave to the jury the question of his authority.

Morse, Banks & Banking, p. 206; *Merchants Nat. Bank of Boston* v. *State Nat. Bank of Boston*, 77 U. S. 10 Wall. 604, 19 L. ed. 1008.

The action is not upon the check. It is a suit for money had and received based upon the duty of the bank to carry to the credit of the plaintiff on the 19th of May the amount of the check, there being then sufficient funds to the credit of the drawer.

Kilsby v. *Williams*, *supra*; *Munn* v. *Burch*, 25 Ill. 35.

Shepard, J., delivered the opinion of the court:

This is an action for money had and received. On May 16, 1884, one George H. Levis, in the city of Washington, a depositor of the defendant bank, executed and delivered two checks on said bank, in the usual form, for $1,000 each, payable to the order of M. D. Helm, who, for value, on the same day endorsed them to the plaintiff Averell. One of these checks bore date as of the 18th of May. The check dated May 16th was paid by the bank on the same day after its closing hour, and this suit is to recover the amount of the second or post-dated check, with $2.05 protest fees.

The testimony of the plaintiff Averell, which was not contradicted, is substantially as follows:

"I had dealings with the defendant bank in reference to said checks on the 16th day of May, 1884. I received that check and another check for $1,000, one bearing date the 16th day of May, 1884, and the other bearing date the 18th day of May, 1884, from M. D.

Helm, about 3 o'clock, P. M. I went to the defendant bank to get them cashed, and arrived there about 3:30 P. M. The outside door of the bank was closed, but upon my knocking it was opened by the watchman of the bank and I was invited into the rear room occupied by the bank, through a door leading therein from the hall; I went into the rear part of said room occupied by the bank, and from there into a private compartment partitioned off from the main room of the bank; this private room was used by, and in connection with, and contiguous to the bank. While there I was approached by Mr. Robert M. Drinkard, one of the officers of the defendant bank, with whom I was acquainted, and he asked me what he could do for me. In reply I stated that my nephew was very ill in New York and that I was anxious to leave the city that evening to visit him and needed the money for that purpose. At his suggestion I endorsed the checks which I had received from Helm, as I have stated, and presented them to him for payment. Mr. Drinkard received them and immediately went to the counter of the bank, a few steps from the private apartment where I was, and returned with $1,000 in payment of the check dated May 16th, 1884. He then called my attention to the fact that the check dated May 18, 1884, was dated May 18th, which fell on Sunday, and would not be due and payable until Monday, May 19. I told Mr. Drinkard that I would not be in the city on the 19th of May, and he then said he would place it to my credit and that I could check against it. Thereupon, at his suggestion, I wrote my name in the signature book of the bank.

"Mr. Drinkard retained the check, and I left it with him with the distinct understanding that an account was opened between the bank and myself on the said check, and that the same was placed to my credit in the account.

"On or about the 23d day of May, 1884, I returned to the city of Washington and went to the bank for the purpose of getting some money, and while I was writing a check for it Mr. Drinkard called me to the counter and presented me with the check, with the protest attached thereto, and stated that it had been protested, and that there was due and payable to the bank the sum of $2.05 for the said protest, which I paid, and received the check and the certificate of protest.

"On the first visit the bank was closed for the day's business, but was opened to oblige me by admitting me to the rear entrance by a side door leading from the main hall. Mr. Drinkard and other officers of the bank were still busy with their books and papers when I arrived there."

It was further proved that on May 19 (the day of the maturity of the check in question) at the opening of the bank there was to the credit of Levis the sum of $5,126.48 subject to his checks. On that day the bank paid $3,928.33 on other checks of Levis, some of them bearing date that day, one of these being for $2,000. It also reserved the amount of two drafts on New York which it had discounted and forwarded for collection, one for $790.10, due May 17, the other for $801.20, due May 19, the latter being dishonored at 3 o'clock on that day.

The bank learned of the non-payment of the draft maturing May 17th by mail on the morning of the 19th about 9 o'clock. It learned of the non-payment of the second about its closing hour on the 19th. These drafts had been placed to the credit of Levis by the bank as cash; and the bookkeeper had been instructed by the cashier not to let his account be drawn below the amount thereof.

The bank had, besides the paying teller, Drinkard, a receiving teller and a collection clerk, the window of each of whom at the bank counter in front being indicated by a sign. Drinkard had been both paying and receiving teller up to 1879. Between that time and the date of the transaction in controversy, he had with the knowledge and acquiescence of the cashier, occasionally received deposits and opened up new accounts by taking the signatures of depositors in the "signature book." It was shown also that signatures were sometimes taken for the purpose of identifying that upon which the draft is cashed, or to preserve an address, etc.

Plaintiff had no account with the bank, and his name nowhere appeared on its books as a depositor. The usual course of business at the bank for depositors was to deliver post-dated or undue checks to the collection clerk, and those payable at once to the receiving teller to be charged to the drawer and credited to the depositor.

The small room in which Drinkard met plaintiff and received the check was separated from the main office by a wire partition, in which there was a door and a small arched opening for the passage of papers. It had a door also communicating with the president's room. Drafts had been cashed and deposits received in this room occasionally, after the regular closing hour; and it was customary at such times to transact business there with such customers as the bank was willing to accommodate.

The case has been tried three times in the special term, and twice, on appeal, in the general term of the supreme court of the District of Columbia. On the first trial the jury were directed to find for the defendant; but the judgment was reversed. 6 Mackey, 358.

On that trial the only evidence regarding the protest of the check on the 19th of May was the certificate of the notary that it had been presented at the bank for payment at the request of the bank. The trial justice was of the opinion that Drinkard was the agent of the plaintiff in the transaction and not of the bank. The court, in general term, reversed this judgment in a short opinion, in which great stress was laid upon the fact that the check was protested at the request of the bank, and that this was a ratification of the paying teller's act in receiving it for deposit to plaintiff's credit.

On the second trial proof was offered by the defendant tending to show that after 3 P. M. on Monday Drinkard, accompanied by the notary, carried the check to the cashier, and asked him what to do with it, and that the cashier suggested to him that he had better hand it to the notary, in order to save the

rights of the parties and hold the indorser; in other words, that the protest was made for the benefit of the plaintiff. The trial justice, following, as he supposed, the opinion of the general term, submitted the case to the jury to find from the evidence whether the act of Drinkard had been recognized or ratified by the defendant, and refused an instruction, asked by defendant, to the effect that if the jury should believe the evidence above mentioned to be true, they would regard the protest as no evidence of ratification by the bank of the act of Drinkard; and further would find that, upon the evidence in the case, Drinkard was to be considered the agent of the plaintiff, and not of the bank. The jury found for the plaintiff and, on appeal, the general term held that the refusal of said instruction was error, and again reversed the judgment. 8 Mackey, 246. The court was of opinion that the additional evidence, explaining the protest, made a radical change in the case and took it out of the ruling upon the first appeal.

On this, the third trial (and for the first time), testimony was introduced respecting the time when defendant's cashier first learned of the possession of the check by Drinkard. The cashier was called by the plaintiff and testified as follows, as appears from the notes of his testimony in the bill of exceptions: "*Q.* When did you first learn of this check? *A.* I do not remember. I think I knew of it though before the 19th. I knew that the check was there on Mr. Drinkard's counter. *Q.* What did he tell you about it? *A.* I do not know that he told me anything of the fact. I knew that he had it in his possession. *Q.* You knew that it was in his possession? *A.* Yes, sir. *Q.* Did you know that General Averell's signature was upon the book of the bank? *A.* No, sir; that did not come to my knowledge until afterwards. *Q.* At what time? *A.* I cannot tell—I think when the inquiry began to be made there afterwards about the check; I do not think I had any knowledge; I do not remember that I had any knowledge of General Averell's signature being upon the book at all. *Q.* Well, can you state on what date you learned that Mr. Drinkard had it? *A.* I think that I knew that probably on the 16th; I think that I knew of it on the evening of the 16th; I had knowledge that he had that check in his possession. *Q.* On his desk? *A.* Yes, sir. *Q.* Did Mr. Drinkard tell you from whom he had received it? *A.* I think so; yes, sir. *Q.* That he had received it from General Averell? *A.* Yes, sir. *Q.* And did you know why he had it? *A.* No, sir; I knew nothing of the fact that he had gotten a check cashed there that evening. *Q.* He had one check cashed, and Mr. Drinkard had the other? *A.* Yes, sir. *Q.* You knew that the check did not belong to Mr. Drinkard, did you not? *A.* I did not think of it in that way. *Q.* Did you know at that time that that check was to be presented on the 19th? *A.* No, sir: I do not think I did, sir; it was a post-dated check that he had in his possession. *Q.* Did you know what he had it there for? *A.* The inference was that it was there to be paid, if I had thought of it at all?"

Upon the close of the testimony, the defendant prayed the court to instruct the jury that upon the whole evidence the plaintiff was not entitled to recover. This was refused, and the defendant excepted.

At the request of defendant the court gave the following special instructions to the jury; the first is the same for the refusal of which the judgment had been last reversed.

1. "If the jury believe from the evidence that Mr. Drinkard, the paying teller of the bank, after three o'clock on May 19, when there was no money to Levis' credit, as shown by the proof, in company with General Balloch, the notary, consulted Mr. Swain, the cashier, as to whether the check should be protested, and that the cashier stated to him that in order to save the rights of the parties to the check he had better have it protested, and Mr. Drinkard handed the check to the notary to protest it, that is not sufficient evidence of a ratification by the bank of the act of Drinkard, and will not enable the plaintiff to recover."

2. "If the jury believe from the evidence that the cashier of the defendant bank on the evening of the 16th of May, 1884, knew that the paying teller had possession of the check in question, and that it so remained in his possession, but the cashier did not know of any agreement or arrangement between the paying teller and the plaintiff, to the effect that said check should be placed to the credit of the plaintiff on the following Monday morning, subject to his check, then the same is not evidence from which an acceptance of said check by the bank may be inferred, and will not entitle the plaintiff to recover."

The court then gave the following special instruction at the request of the plaintiff:

"If the jury believe from the evidence that the check in question, bearing date on the 18th day of May, 1884, was deposited by the plaintiff with the defendant bank, and by it received through its officer, Drinkard, on the 16th day of May, 1884, to be placed to the plaintiff's credit, and further that the bank by its cashier knew of such transaction and assented thereto, and the same was in defendant's possession at the opening of the said bank on the 19th day of May, 1884, and that there were then sufficient funds to the credit of the drawer in said bank to pay the same, the plaintiff is entitled to recover, and the measure of his recovery should be the face of the check, one thousand dollars, and two dollars and five cents protest, with interest from the 23d day of May, 1884."

The court also gave another instruction in obedience to the opinion of the general term on the last appeal as follows: "Upon the evidence in the case, Drinkard, the paying teller, in receiving the check, is to be considered the agent of the plaintiff, and not the agent of the bank."

But this instruction, in order to harmonize with the instruction given on behalf of the plaintiff, was accompanied by this qualification:

"That is a true, and a correct statement of

the law, that in receiving it, he was the agent of the plaintiff, and not the bank; yet Mr. Swain had the power and the right to convert Mr. Drinkard's act into the act of the bank; and the question for you to determine is, as I have said before, whether he did so or not, and in determining that question, you are to take into consideration all the facts and circumstances in the case."

To the addition of the foregoing qualification, as well as to the grant of the plaintiff's special prayer aforesaid, the defendant excepted.

The jury found for the plaintiff, and judgment was rendered for the full amount of the sum claimed, with interest. From this judgment the appeal has been duly prosecuted.

1. The first error assigned is based upon the refusal of the court to permit the defendant to prove by its cashier, who had been examined as a witness by plaintiff, that if the plaintiff had brought the post-dated check to the bank on the 16th or 17th, and presented it during business hours, it would not have been received as a deposit from him as a depositor and an account opened. There is no doubt that a bank has the right to reject or accept a depositor at will. Morse, Banks & Banking, § 178.

But this right was not in issue. The question to be determined by the jury was this: Did the defendant receive this check after business hours, for collection, out of any funds the drawer might have in its possession when it should become payable, and promise to hold the money when collected, to the plaintiff's credit and subject to his check? In other words, did the paying teller, Drinkard, receive the check from plaintiff for the purposes aforesaid; and did the cashier, with knowledge thereof, ratify or acquiesce in his action. The question was, what had been done under certain circumstances; not what might have been done under others. The evidence was not relevant, and the court was right in excluding it.

2. The doctrine is unquestioned that where a corporation is engaged in a business requiring the services of several agents, whose powers are limited and whose duties are separate and distinct, and a party knowingly deals with one of them in a matter beyond his authority, he cannot hold the principal bound by the agent's act unless the same shall have been ratified. Had the plaintiff met Drinkard away from the bank and intrusted the check to him, relying upon him to collect it and deposit the proceeds to his credit, clearly the bank would not have been bound by Drinkard's action, without some act of ratification. Under such circumstances Drinkard would be his own agent and not the bank's. *Manhattan Co.* v. *Lydig*, 4 Johns. 377, 4 Am. Dec. 289. The facts in this case, however, show that the check was delivered to the teller at the bank where he and all the officers of the bank were engaged in attention to their duties. He was the paying teller, it is true, but he had occasionally acted as receiving teller within the knowledge of the cashier and without any objection from him. By acquiescence of the principal in the exercise of authority beyond his agency the powers of a limited agent may sometimes become greatly extended. *Merchants Nat. Bank of Boston* v. *State Nat. Bank of Boston*, 77 U. S. 10 Wall. 604, 19 L. ed. 1008. If the facts in this record had all been before the general term on the last appeal before this, it is not probable that the court, in its opinion would have gone so far as it did in the limitation given to Drinkard's agency. That opinion, too, was based almost wholly upon the case of *Thatcher* v. *Bank of the State of New York*, 5 Sandf. 122, a decision by the supreme court of New York, the authority of which has since been overturned by the court of appeals in the well-considered case of *East River Nat. Bank* v. *Gove*, 57 N. Y. 597.

In that case the bank sued Gove to recover $1,100 that had been paid him by mistake. By some error he had been credited with that sum in excess of his deposits and had drawn it. When the mistake was discovered he was asked to return the money. Failing to do so for some days, the paying teller wrote him a note asking him to call and pay the amount due. Gove knew that there was both a paying and a receiving teller in the bank. He came to the bank and paid the money to the paying teller, who failed to report it. It does not appear where the receiving teller was at the time. The proof showed that the paying teller sometimes, in the absence of the receiving teller, had received money paid to or deposited in the bank. The bank was held bound by the receipt of the money by the teller. The court said: "Banks must be held responsible for the conduct of their officers within the scope of their apparent authority. When one goes into a bank and finds behind the counter one of its officers employed in the business, and upon his demand pays a debt due the bank, in good faith, without any knowledge that the officer's authority is so limited that he has no right to receive it, he must be protected and the bank must be bound by the payment." See also *Munn* v. *Burch*, 25 Ill. 35.

The principle governing the New York case seems to us to be both reasonable and just, and the facts of this case, as we find them in the record before us, are clearly within it. Averell was not a customer of the defendant. He was slightly acquainted with Drinkard, but knew no one else connected with the bank. He called after the doors were closed for the day, as others frequently did for the transaction of business, and was admitted and shown into the ante-room. This room was next the main office where the officers and clerks were still at work, and persons therein could see through the wire partition. Drinkard went to meet the plaintiff, ascertained his business and took the two checks which he presented. He went back to the main office, procured the money and paid the check which bore date that day. He retained the post-dated check, promising to pay it when due and enter it to plaintiff's credit as a deposit. As is usual in the case of receiving a deposit he brought out the "signature book" and had plaintiff to write his signature so that the genuineness of his checks might be established by comparison

in case of need. These transactions were had, it may be said, in the very presence of the cashier, or more nearly so than similar transactions during the ordinary business opening of the bank.

Though not charged with the particular duty of receiving such checks for collection and deposit, Drinkard had nevertheless occasionally performed the duties of the receiving teller within the knowledge of the cashier and without his objection. It is not shown as a fact that the plaintiff intended to make Drinkard his own agent; nor does it appear that he was aware of any limitations upon his authority in that regard.

The cashier testified that he saw the check on Drinkard's desk on the same afternoon and knew that he had received it from plaintiff; that he did not think it belonged to Drinkard, but inferred it was there to be paid. He made no further inquiry and said nothing with respect to Drinkard's exercise of authority beyond the scope of his employment.

The trial justice, following the decision on the last appeal, charged the jury that in the transaction Drinkard was the agent of plaintiff and not of defendant. But he further instructed them substantially to the effect that if the cashier knew of the transaction immediately after it occurred and assented thereto, the defendant would be liable for the amount of the check and protest fees if, on the 19th, the drawer had sufficient funds in the bank to meet it. We find no error in the charge with which the case was given to the jury, either in the instructions given on behalf of plaintiff or in the qualification attached to defendant's special instruction. Had the court instructed the jury to find as a fact from all the evidence, whether or not in the transaction itself, Drinkard was acting as the agent of the defendant, we would not hold it to be error. The effect of the charge as given was substantially the same as that, but the form in which it was put made it more favorable to the defendant.

3. When the bank opened on the 19th the drawer had funds therein more than enough to discharge the check. This was sufficient to make the bank liable, and it made no difference that at the closing hour the account of the drawer had been overdrawn. The money must be considered as if in fact collected and placed to the credit of the plaintiff, and the failure to recognize his right to it gave him his right of action as for money had and received. *Kilsby* v. *Williams*, 5 Barn. & Ald. 815; *Oddie* v. *National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160; *City Nat. Bank of Selma* v. *Burns*, 68 Ala. 275, 44 Am. Rep. 138; *Tinkham* v. *Heyworth*, 31 Ill. 519. It was well said in *Kilsby* v. *Williams* that: "When they received the check from him they became his agents to receive the money upon it as soon as possible, and if they could be allowed to appropriate the money received by them to the payment of subsequent checks it would be doing great injustice and injury to their own customers." In *First Nat. Bank of Cincinnati* v. *Burkhardt*, 100 U. S. 686, 25 L. ed. 766, it was held that if at the time a check is handed in to the bank, the holder demand to have it placed to his credit, the bank may refuse to do so. But if it retains the check it is bound to the depositor; and no usage or custom that checks shall be held and only credited at the close of the day's business, provided there are then funds on hand to meet it, will be suffered to prevail against it. It was also said that in such a case the ordinary rule that a day is an indivisible unit will be disregarded, and the actual priority of the transaction permitted to be shown.

No error having been found in the proceedings below, *the judgment must be affirmed*, with costs to the appellee; and it is so ordered.

OHIO SUPREME COURT.

James D. CASE, *Plff. in Err.*,
v.
E. Jason HALL, Admr., etc., of Benjamin Bartholomew, Deceased, *et al.*

(.....Ohio.....)

***1. Where land is devised in fee simple with direction to the devisee to pay certain legacies** as each legatee attains the age of twenty-one years, the devisee, on accepting the devise, becomes personally liable to pay the same as directed by the testator.

2. And where, in such case, the devisee dies before all the legatees attain the requisite age, his estate, as an entirety, remains liable to such as thereafter become of age; and it is the duty of his administrator, having assets, to pay the same.

3. Again, in such case, where the legatees become the owners of the land, not by the provisions of the will but by descent, the legacies, remaining unpaid, are not extinguished by merger or otherwise, but must be paid from the personalty of the deceased devisee, where that is sufficient, as any other debt of his estate.

(October 16, 1894.)

ERROR to the Circuit Court for Delaware County to review a judgment affirming a judgment of the Court of Common Pleas in favor of defendants in an action brought to compel payment of money which defendants' intestate had promised to pay in consideration

Headnotes by the COURT.

NOTE.—The above case presents an unusual question as to the merger of legacies in an estate in fee in land, on which they constitute a lien, which descends to them from a devisee who was bound to pay the legacies. Many cases as to charges of legacies on land are collected in a *note* to Davidson v. Coon (Ind.) 9 L. R. A. 584. See also Evans v. Foster (Wis.) 14 L. R. A. 117.

of a devise made by a third person to himself. *Reversed.*

The facts are stated in the opinion.

Messrs. **Jones, Lytle & Jones,** for plaintiff in error:

Benjamin F. Bartholomew, by accepting the devise of real estate under said will and by taking possession of the same, is by implication personally and absolutely liable for the payment of said legacies; the acceptance of the estate devised to him, charged with the payment of these legacies, made them his personal debt, and rendered him personally liable for their payment.

Dunne v. *Dunne*, 66 Cal. 157; *Porter* v. *Jackson*, 95 Ind. 210, 48 Am. Rep. 704; *Dodge* v. *Manning*, 1 N. Y. 298; *Olmstead* v. *Brush*, 27 Conn. 530; *Williams* v. *Nichol*, 47 Ark. 254; *Brown* v. *Knapp*, 79 N. Y. 143; 2 Redfield, Wills, p. 209; *Mensch* v. *Mensch*, 2 Lans. 235; *McLachlan* v. *McLachlan*, 9 Paige, 534, 4 L. ed. 805; *Wood* v. *Wood*, 26 Barb. 356; *Reynolds* v. *Reynolds*, 16 N. Y. 257; *Gridley* v. *Gridley*, 24 N. Y. 130; *Harris* v. *Fly*, 7 Paige, 421, 4 L. ed. 213; *Birdsall* v. *Hewlett*, 1 Paige, 32, 2 L. ed. 550, 19 Am. Dec. 392; *Fox* v. *Phelps*, 17 Wend. 393; *Glen* v. *Fisher*, 6 Johns. Ch. 33, 36, 2 L. ed. 45, 46, 10 Am. Dec. 310.

With respect to "all claims founded upon any obligation, contract, debt, covenant, or other duty the right of action on which the testator or intestate might have been sued in his lifetime survives his death, and is enforceable against his executor or administrator."

3 Williams, Executors, pp. 1721–1723.

One who accepts an estate devised to him, under a charge or condition of his paying a legacy or annuity, is liable in contract for the legacy or annuity, even without any express promise to pay.

2 Williams, Executors, 1272–1273, *note N*, and authorities cited; 3 Williams, Executors, p. 1931, *note K*, and cases cited; 2 Woerner, Administration, p. 1099, and authorities cited.

If the payment of the legacy by the acceptance of the provisions of the will became an obligation of Benjamin F. Bartholomew there can be no doubt that the personal estate of said Benjamin F. Bartholomew, deceased, in the hands of his executor, is the primary and natural fund, which must be resorted to for its payment.

3 Williams, Executors, 1704, 1705.

"If for any reason the debt becomes the debt of the owner of the land, it must be paid out of his personalty."

Bispham, Equity, p. 409, and *note 1*, p. 411; *Thompson* v. *Thompson*, 4 Ohio St. 333; 1 Chitty, Pl. 4–6; *Crumbaugh* v. *Kugler*, 3 Ohio St. 549.

Although at the death of Benjamin F. Bartholomew, the fee of the real estate went to his son Leslie Bartholomew, and at his death, subject to the life estate of Amanda Bartholomew, went to the heirs of Emily Jane Case, the doctrine of merger does not apply.

Bispham, Eq. p. 210.

Mr. **George L. Converse** also for plaintiff in error.

Mr. **J. T. Holmes,** for defendant in error:

To take from the son's widow his separate, personal estate, which by operation of law has become hers, and add it to the testator's estate, in the form of legacies would be to make a new will for Major Bartholomew and rob his son's widow in a way of which he never even dreamed.

The cases which suggest that the devisee is liable personally, hold that the lien continues on the land, and may be enforced even against the vendees of the devisee.

Clyde v. *Simpson*, 4 Ohio St. 459.

The testator intended the provisions of items four and five to be beneficial, not alone to the Case heirs, his grandchildren, but to his son. These provisions constituted his method of dividing his property. The course of events natural and legal has provided for those grandchildren; they hold and own the bounty designed for the son and themselves; it is no longer necessary to have the legacies paid, or if they must be paid, the land should be sold for that purpose.

The testator will be held to have meant that Benjamin should have the full title which the words of "gift, bequest, and devise," carried to him after he had paid the legacies, and not until he had paid them.

Linton v. *Laycock*, 33 Ohio St. 128; Schouler, Wills, § 562; 2 Redf. Wills, *283 *et seq.*; *Lupton* v. *Lupton*, 2 Johns. Ch. 614, 1 L. ed. 512; 2 Lomax, Exrs. 90; 2 Redf. Wills, 209, *note 9*; *Hoyt* v. *Hoyt*, 85 N. Y. 142.

This land is the primary, and sufficient, the intended and the only equitable source or property, for the payment of the plaintiff's legacy.

McCullough v. *Copeland*, 40 Ohio St. 329; *Fuller* v. *Fuller*, 84 Me. 475.

Minshall, J., delivered the opinion of the court:

The suit below was an action for the recovery of a legacy, brought by the legatee against the administrator of a devisee, who, as is claimed, was personally bound to pay it. Judgment was rendered for the defendant, which, on error, was affirmed by the circuit court and the plaintiff excepted. Error is prosecuted here to reverse both these judgments. The facts are as follows: On October 30, 1874, Major Bartholomew died leaving a will which was shortly afterward admitted to probate and recorded. By his will he devised to his wife all his personal estate, and an estate for life in one third of all his real estate, "save that this day deeded by myself and wife to Benjamin F. Bartholomew," and at her death to go to my son Benjamin F. Bartholomew. Then follow the items on which the question arises in this case; and which are as follows:

"4th. I give, bequeath, and devise to my son all the remainder of my real estate, being two thirds of the same after he shall pay to the heirs of my daughter, Emily Jane Case, the several amounts hereinafter bequeathed to each of said heirs.

"5th. I give and bequeath to the heirs of my deceased daughter, Emily Jane Case, one thousand dollars each, to be paid to each of them by my son, B. F. Bartholomew, as they become twenty-one years of age."

On the probate of the will, November 3, 1874, Benjamin took possession of the land

devised to him, used and occupied it as his own to the time of his death, receiving all the rents and profits amounting to some $13,500. He died April 27, 1888, leaving a widow and an only son, Leslie Bartholomew, who died December 1, 1888, intestate and without issue. The heirs of Emily J. Case were her children, eight in number, all of whom became of age and were paid their legacies during the lifetime of Benjamin, except the plaintiff, who became of age March 7, 1890, and W. P. Case, who, though he became of age February 29, 1888, had received but one half of his legacy. Hall was duly appointed administrator of Benjamin, accepted the trust and qualified as such; and the plaintiff, on arriving at age, presented his claim for the payment of his legacy with interest from the time he became of age which was rejected.

Whereupon the plaintiff brought his suit, and the widow of Benjamin having been made a party at the instance of the administrator, both answered. There is, however, no controversy as to the facts. On the death of Leslie, the son of Benjamin, intestate and without issue, the land inherited from his father passed by descent to his cousins, the heirs of Emily Jane Case, deceased, and of whom the plaintiff is one. His mother took the personalty, and, as widow, was entitled to her portion of his father's estate. The question presented is, whether in view of the facts and the language of the will, the legacy bequeathed the plaintiff by the will of his grandfather became a personal obligation of Benjamin Bartholomew on his accepting the devise of the land made to him. The plaintiff claims that it did; the defendants claim that it did not; that no personal obligation attached until the time appointed for the payment of the legacy; and, this not having arrived until after the death of Benjamin, no personal obligation can be asserted against his estate; and that the plaintiff must look to the land on which his legacy is simply a charge and no more. This view seems to have prevailed in both the lower courts, but we are unable to adopt it. Whilst many cases may be found in which a question was made as to whether a certain legacy had, by a fair construction of the will, been charged on land devised, none has been cited, where, in a case like this, the entire fee simple is devised to one with direction to pay certain legacies, an acceptance of the devise does not, without question, impose a personal obligation on the devisee to pay the legacies. Thus in *Glen* v. *Fisher*, 6 Johns. Ch. 33, 2 L. ed. 45, 10 Am. Dec. 310, it is held that, where land is devised charged with the payment of a legacy, and the devisee accepts the devise, he is personally and absolutely liable for the legacy; and he has no right to require of the legatee, before payment, a security to refund, in case of a deficiency of assets, to pay debts. And in *Fuller* v. *McEwen*, 17 Ohio St. 288, this court stated the rule in substantially the same language, and held that, in an action to enforce such personal obligation the fact that the devisee or legatee is or is not also the executor of the will, makes no difference in the case. The rule is also recognized and stated in *Yearly* v. *Long*, 40 Ohio St. 27. The rule is thus stated in *Porter* v. *Jackson*, 95 Ind. 210, 48 Am. Rep. 704: Where lands are devised to one who, by the will, is directed to pay a legacy, the legacy is charged upon the land devised, and when payment of the legacy is made a condition of the devise, its acceptance creates also a personal liability to the legatee which may be enforced without resorting to the land, the lien still remaining as a security. Many other cases might be cited to the same effect; and are sustained by text-writers of standard authority. Woerner, Administration, 1099; Williams, Executors, 1272, 1704.

The rule rests upon the reasonable principle, that he who takes a benefit under a will must take it subject to its provisions; any other construction would necessarily defeat the intention of the testator. So that, where a devisee is required to pay legacies to others, an acceptance of the devise imparts a promise to pay the legacies; and the legatees have the right to maintain an action thereon for its non-performance, as though the promise had been made to themselves.

There is, we think, no ground for the contention that the estate in the land, devised to Benjamin, did not vest until the payment of the legacies had been made. Payment is not made a condition precedent to the vesting of the estate; the effect of the language employed is simply to charge the land as a security for the payment of the legacies. *Thompson* v. *Hoop*, 6 Ohio St. 480, 489; Woerner, Administration, 592. Therefore, Benjamin took an estate in fee simple in the land, devised to him, on the death of the testator.

It is claimed, however, that while such is the general rule, the facts bring this case within the principle on which *Decker* v. *Decker*, 3 Ohio, 157, was decided. That was regarded by the court as a novel case. The land was devised by his father to Jacob Decker with direction to pay certain legacies at different times in the future to the other children of the testator, with a limitation that if Jacob should die without issue, the estate should go to those other children. By this provision the court held that the devisee took simply a life estate in the land, and that this negatived any intention to make the legacies, before they became due, a personal liability of the devisee. The apparent injustice of charging the devisee personally with the legacies, though the estate might terminate by his death before he received any benefit therefrom, influenced the court in making the holding it did. And the judge delivering the opinion observed that "a devise of the fee, has been considered as sufficient to show an intention in the testator, to create a personal charge, while a devise of any inferior interest, as an estate for life, is taken to indicate an intention to charge the land, and not the person of the devisee." In the case before us the land was devised in fee, and was of much greater value than the legacies the devisee was required to pay. Subject to the payment of the legacies he could deal with it as he pleased, and did so.

At his death it passed, by operation of law, to his son as his heir, and not by the provisions of the will of his father; and this marked distinction in the facts clearly distinguishes the case from that of *Decker* v. *Decker*. Here the entire subject of the devise became, by its acceptance, the property of the devisee, charged, however, with the payment of the legacies. It went to increase the amount of his estate, less only the sum of the legacies to be paid. The fact that he might die before the time fixed for the payment of any or all of the legacies was not, under the provisions of the will, in any way to affect the quantity of his estate in the land. Whether he paid any or all of the legacies during his lifetime, his estate in the land would be none the less; and it would, and did, descend to his heir in fee simple, subject only to the payment of such legacies as had not been paid. Such, without doubt, was the intention of the testator; and to give the will any other construction would defeat that intention. He designed that his son would have the land, for he in plain terms gives it to him; but he also designed that the children of his deceased daughter should have their legacies, as a part of his bounty, for he directs his son, as devisee, to pay them as they attain twenty-one years of age. His son and these children were the immediate objects of his bounty; they were the only ones that concerned him. He cannot be supposed to have foreseen all that afterwards happened,—the death of his own son, and the heir of the latter, intestate and without issue, before all of the children of his deceased daughter had arrived at twenty-one years of age; and to speculate as to what he would have done, had he foreseen these remote contingencies, is useless, as it can shed no light upon the construction of his will. But it is well, in this connection, to observe that he had provided liberally for his own son—having given him the greater portion of his estate; and no reason is perceived why he should have had more concern for the widow of his son, so provided for, than for those of his own blood, related to him as grandchildren.

But again it is claimed that the direction being to pay each of the legatees as they became twenty-one years of age, the legacy to each did not vest until the legatee attained that age; and, therefore, that no personal obligation attached to pay any particular legatee until he attained the age of twenty-one; and, therefore, the personal estate of Benjamin is not liable for the payment of the legacy to the plaintiff as he did not attain twenty-one years of age until after the death of Benjamin. It is not necessary, as we think, to decide whether these legacies vested at the death of the testator, or LOT; though, under the settled rule in such cases, we see no reason for saying that they did not. Bingham. Descents, 59. If they did not, still a conditional liability, personal in character, was created as to each, which became absolute on the legatee attaining the requisite age; the legacy then became an absolute personal liability of the devisee, if living, or of his estate, if dead. Now it is the settled rule of the law that the personalty of an estate is the primary fund for the satisfaction of all the personal obligations of the deceased. Williams, Executors, 1705. And that it was the personal duty of Benjamin Bartholomew to pay this legacy to the plaintiff on his arriving at twenty-one years of age, has been already shown to have arisen from his acceptance of the devise under the will of his father. And although he died before the time arrived for making the payment, the obligation attended his estate as an entirety, to be performed by his administrator as his personal representative. It frequently happens that a conditional obligation, assumed by a person in his lifetime, does not become absolute until after his death, and must be, and is, satisfied by his administrator, though not named in the contract. Williams, Executors, 1724. In addition to the many instances given by this author, the obligation of a principal to indemnify his surety may be noticed. No absolute obligation arises in such case until the surety has paid the debt, and this may be after the death of the principal; and the state of the principle then becomes liable to indemnify the surety. The case of *Camp* v. *Bostwick*, 20 Ohio St. 337, 5 Am. Rep. 669, grew out of such a state of facts, and was prosecuted against the heirs for assets received, because the liability of the deceased did not, by the payment of the surety, become absolute until after the administrator had settled the estate, and the suit as to him had become barred.

There remains the further contention, that the legacy to the plaintiff has merged in the legal estate, which, by operation of law, has descended to him and his brothers and sisters, co-legatees, by the death of Leslie Bartholomew, intestate and without issue. This, we think, is entirely erroneous. It is true as a general rule, that where the equitable and legal estate unite in the same person in the same right, the former will merge in the latter. But this is simply a rule of convenience to the owner of the two estates, and is never applied where it would be to his interest to treat the equitable interest as subsisting. Here, as shown, the plaintiff has the right to have his legacy satisfied from the personal estate left by Benjamin Bartholomew, though, by so doing, it will diminish a fund that would otherwise go to his widow. His right in this regard is that of a creditor of the deceased. The fact that, by inheritance, he with his co-legatees, has become an owner of the land, that may be treated as a security for the payment of the legacy, does not change the equity of the case. It is not by any provisions of the will that this has occurred; and the fact, as before shown, cannot, therefore, in any way influence its construction. The condition of the plaintiff is, in law, no way different from what it would have been, had he and his brothers and sisters purchased and paid full value for the land. In such case, as it would be to his interest to treat the legacy as existing, though a lien on the land, for the purpose of enabling him to compel it to be satisfied by his debtor, or his estate, the law would treat it as existing for such purpose. The legacy and the lien

are not inseparable. The legacy is the principal, the lien is an incident, and may be extinguished by merger in the estate of the creditor, although the legacy is not.

Judgment of the lower courts reversed, and judgment on the pleadings for the plaintiff in error.

OHIO SUPREME COURT.

BOARD OF EDUCATION OF MARION TOWNSHIP, *Plff. in Err.*,
v.
STATE of Ohio, *ex rel.* A. C. LINDSEY.

(51 Ohio St. ——.)

*1. **Where no obligation, legal or moral, rests upon a board of education, to pay a claim** asserted against it by a private individual, an act of the general assembly, procured by the claimant, commanding such board to levy a tax for its payment, is unconstitutional and void.

2. **In such case, if the board of education disputes the facts** asserted by the claimant as the foundation of his claim, the general assembly, while it may make inquiry to ascertain, in the first instance, the truth of the facts so asserted, yet is without authority to conclusively find and recite in the act providing relief, the facts in dispute, so as to estop the board of education from contesting them in a court of justice where the act is sought to be enforced.

(June 19, 1894.)

ERROR to the Circuit Court for Fayette County to review a judgment, granting a writ of mandamus to compel the Board of Education of Marion Township to levy a tax to pay a claim which relator held against the township and which the legislature had by special act directed to be paid. *Reversed.*

Statement by **Bradbury, J.:**

The defendant in erorr brought an action of mandamus against the plaintiff in error in the circuit court of Fayette county to compel it to levy a tax under and by virtue of the following act of the general assembly of this state:

"Section 1. *Be it enacted by the General Assembly of the State of Ohio*, That the board of education of Marion township, Fayette county, Ohio, shall, at the next regular meeting of the said board of education, after the passage of this act, levy upon the taxable property of said Marion township, Fayette county, Ohio, not to exceed one mill on the dollar, as and for a contingent fund, for the purpose of refunding to A. C. Lindsey, former treasurer of said township, the sum of one hundred and ninety-seven dollars and seventy-six cents, with interest thereon from April 1, 1882, which said sum was charged to said A. C. Lindsey, as treasurer, and said sum paid over to his successor in office, by mistake, and has not been refunded to him; that said board of education shall certify said levy to the auditor of said Fayette county, Ohio, as required by law, and the clerk of said township shall draw an order upon the treasurer of said township in favor of said A. C. Lindsey for said sum of one hundred and ninety-seven dollars and seventy-six cents, with interest from April 1, 1882, to be paid out of the contingent fund of said Marion township, Fayette county, Ohio."

In his petition he states in substance that on and before September 29, 1874, and for several years thereafter, he was the treasurer of said township of Marion, and as such was *ex officio* treasurer of the school fund of said township. That the clerk of said township on said 29th day of September, 1874, pursuant to the order of said board of education, issued to one William Clark a warrant for the sum of $197.76, payable out of the school fund of said township, which the relator paid from said fund to the person in whose favor said order was drawn. That afterwards, when he came to settle with the county auditor, the said warrant having been lost, he was charged with the amount thereof, and that he has never been reimbursed for the same, and that when he came to settle with his successor in said office the amount of this warrant was charged to and paid by him to such successor.

*Headnotes by the COURT.

NOTE.—On the question of implied restrictions on legislative power in cases somewhat similar to the above, see *note* to Staton v. Norfolk & C. R. Co. (N. C.) 17 L. R. A. 838, in which most of the authorities deny that the power of the legislature to take private property or interfere with vested rights is unlimited.

Somewhat akin to these authorities are those found in the *note* to Louisville, N. O. & T. R. Co. v. Jordan (Miss.) 16 L. R. A. 251, respecting the constitutionality of private statutes to authorize disposal of property, and those in the *note* to Lowe v. Harris (N. C.) 22 L. R. A. 379, concerning the constitutionality of a statute legalizing an invalid private contract.

In respect to the public purposes for which money may be appropriated or raised by taxation, see numerous authorities collected in a *note* to 25 L. R. A.

Daggett v. Colgan (Cal.) 14 L. R. A. 474, most of which, however, are cases of attempted action by municipalities rather than by the legislature. For other cases as to the power of the legislature in this respect, see Waterloo Woolen Mfg. Co. v. Shanahan (N. Y.) 14 L. R. A. 481.

For constitutional restrictions on the power of the legislature in this respect, see Bourn v. Hart (Cal.) 15 L. R. A. 431; Patty v. Colgan (Cal.) 18 L. R. A. 744; Cutting v. Taylor (S. Dak.) 15 L. R. A. 691; Synod of Dakota v. State of South Dakota (S. Dak.) 14 L. R. A. 418; Institution for Education of Mute and Blind v. Henderson (Colo.) 18 L. R. A. 398; Wasson v. Wayne County Comrs. (Ohio) 17 L. R. A. 795; Conlin v. San Francisco Bd. of Supvs. (Cal.) 21 L. R. A. 474.

See also the following case of State v. Moore (Neb.) *post*, 774.

See also 25 L. R. A. 774; 28 L. R. A. 187.

That in the year 1892 the relator found said warrant, presented the same to said board of education, together with full proof of its having been paid by him and his never receiving credit therefor, and requested that a warrant be issued to him for the sum due to him by reason of the premises, which said board refused to do, though admitting the facts to be as he claimed they were, on the ground that they had no power to go behind the settlements previously made. Whereupon he applied to the general assembly of the state and procured the act aforesaid, to be passed, and that said board have refused to levy a tax according to its requirements.

To this petition the board of education answered as follows:

"Now comes the defendant, the board of education of Marion township, Fayette county, Ohio, and for answer to the petition of the plaintiff, says:

"It denies that the said J. V. Cutright, clerk of said township, pursuant to any order or resolution of said board, issued in favor of the said William Clark the warrant mentioned in the petition. Said defendant denies that it by any order, resolution, or otherwise, authorized the said clerk to issue the said warrant. It denies that said order was ever delivered to the said William Clark, or by him presented to the said relator, as such treasurer, or that the said relator ever paid the same to the said William Clark, or to any one else. It says that at the date of said warrant, said defendant was not indebted to the said Clark, nor was the said Clark asserting any demand or claim against it.

"It denies that in paying to his successor in office the amount of school funds charged against him as such township treasurer the said relator paid said sum of $197.76, or any other sum of his own funds; but on the contrary, the said defendant charges the fact to be that the said relator became a defaulter in his said office, and was by the township trustees of said township, about the ——— day of ———, 1878, removed from his said office, and one C. C. McCray was appointed his successor, and the said relator was unable to and did not pay to his said successor the amount so charged against him of school funds; and there still remains a balance of $60 of said school funds so charged against the said relator as such treasurer, which has never been paid to the said successor or any other treasurer of said township, by the said relator or any one for him.

"Said defendant further says it is true that at some time in the year 1892, the relator presented the said warrant to the defendant and requested the defendant to order its clerk to issue a warrant for the payment of the same, and the said defendant refused so to do; but it denies that the said relator ever presented any proof of payment of the same, or the failure of the said auditor to give credit; or that they admitted the facts, as stated in the petition, but the said defendant always denied the facts to be as claimed by the relator.

"Said defendant says the facts in regard to said order are as follows:

"Prior to the 1st day of August, 1874, the said board of education of Marion township had instituted in the probate court of Fayette county, Ohio, certain proceedings to condemn lands for school-house site in said township. The awards made in said proceedings, together with the costs taxed to the said board therein amounted to the said sum of $197.76. The said board had in said proceedings incurred an expense of $15.00 for the services of H. B. Maynard, an attorney, all of which was by said board apportioned between the two school districts interested, and was paid by two orders, one for $103.43, and one for 109.33, which were on said first day of August, 1874, issued by the clerk, upon the order of said board, to said William Clark, who was at that time a member of said board, and said orders so issued to the said Clark were paid by the said relator, and the money was thereupon disbursed by the said Clark in payment of said award, costs, and attorney fee; and said orders so paid by the said relator were duly credited to him in his annual settlement with the county auditor.

"Afterward, on the 29th day of September, 1874, the said clerk by mistake issued another order for the amount of the said award and costs, being the warrant mentioned in the petition, but said warrant was not delivered to the said Clark, the payee named therein, and was not paid by the said relator, the mistake having been discovered in the mean time. But said warrant in some way unknown to the defendant came into the hands of the relator, and he has ever since retained the same, and never until the year 1892, claimed to have paid the same, or that he was entitled to credit for the same in his settlements with the county auditor.

"The defendant says the said board of education was never legally, equitably nor morally bound to pay to the relator the amount of said warrant, or any sum on account thereof. The said defendant further says: It is true that the general assembly of the state of Ohio, on the 16th day of February, 1893, passed the act mentioned in the petition; but it avers that said enactment commanding the levy of a tax, and the payment of a claim of the character of that of the relator, for which the defendant was not bound legally, equitably or morally, as appears from the facts hereinbefore set out, was not a legal exercise of the taxing power of the said general assembly, said tax ordered to be levied not being for any public purpose, and said act is for that reason wholly void and of no effect.

"The defendant further says that at the time when the act of the general assembly mentioned in the petition was passed, the defendant denied and still denies the existence of the facts which would furnish the basis for the relator's demand, or which would render the said defendant equitably and morally, if not legally, bound to pay the same; but then, as now, asserted the facts to be as set out in this answer. The said general assembly, in said enactment, did not provide any means of determining the facts on which the demand of the relator is founded, either by the trial in court, before a board of audit constituted for that pur-

pose, or otherwise; but said general assembly attempted, by said enactment, to pass upon the facts, to adjudge the said defendant liable on said demand, and to enforce payment by taxation, which action on the part of said general assembly was an attempt to exercise judicial and not legislative power, and said enactment is for that reason void, and can furnish no basis for the relief prayed for in the plaintiff's petition.

"Wherefore the said defendant says that a peremptory writ ought not to issue in this case, and it asks to be discharged and to recover its costs."

To this answer a demurrer was interposed by the relator and sustained by the court; whereupon a peremptory writ of mandamus was awarded commanding the board of education to levy a tax according to the provisions of the act under which the proceedings had been commenced.

This action of the circuit court the board of education brings into this court for review.

Messrs. **Hidy & Patton,** for plaintiff in error:

Governments are charged with the accomplishment of great objects, necessary to the safety and prosperity of the people. If a tax is levied without the existence of some of these purposes of government to which to apply it, there can be no doubt it would involve a usurpation of authority which would render it illegal.

Cincinnati, W. & Z. R. Co. v. *Clinton County Comrs.* 1 Ohio St. 102.

The power of taxation was delegated to be used for these purposes and these alone.

Debolt v. *Ohio Life Ins. & T. Co.* 1 Ohio St. 581.

It is not difficult to give the most reckless robbery for private purposes the form of constitutional action, and it is as easy to call it a tax as it was in former periods to call those exactions which were enforced by prisons and physical suffering and the quartering of a ruthless soldiery upon the people, by the gentle name of benevolences.

Cooley, Taxation, 693.

The determination of the question whether the purpose for which the tax is levied is a public one does not lie wholly in the province of the legislature.

Cincinnati, W. & Z. R. Co. v. *Clinton County Comrs.* 1 Ohio St. 82; *Marbury* v. *Madison*, 5 U. S. 1 Cranch, 137, 2 L. ed. 60.

The legislature cannot, by declaring the use to be public, when it is, within the constitution, a private one, authorize the property of one citizen to be taken from him and given to another.

Burroughs, Taxation, § 13.

The power of taxation exercised by legislative bodies in this country is limited to public purposes and whether the purpose is a public one is a question for the courts.

Coster v. *The Tide Water Co.* 18 N. J. Eq. 54; *Bankhead* v. *Brown*, 25 Iowa, 540; *Loughbridge* v. *Harris*, 42 Ga. 500; *Concord Railroad* v. *Greely*, 17 N. H. 47; *Lowell* v. *Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Weismer* v. *Douglas*, 64 N. Y. 99, 21 Am. Rep. 586; *Talbot* v. *Hudson*, 16 Gray, 421; *Hampshire County* v. *Franklin County*, 16 Mass. 84; *State* v. *Tappan*, 29 Wis. 664, 9 Am. Rep. 622; *People* v. *Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *Brunswick* v. *Litchfield*, 2 Me. 28; *Debolt* v. *Ohio Life Ins. & T. Co.* 1 Ohio St. 564; *Cincinnati, W. & Z. R. Co.* v. *Clinton County Comrs.* 1 Ohio St. 77.

The legislature is not a proper auditing board as between the municipality and third persons, though it may undoubtedly prescribe the rules of liability for all cases.

Cooley, Taxation, 787.

The legislature has no right to direct a municipal corporation to pay a claim for damages for breach of contract out of the funds or property of such corporation without the submission of such claim to a judicial tribunal.

People v. *Haws*, 37 Barb. 440.

The legislature has no power to compel a municipality to levy taxes for any of the foregoing purposes until the liability to pay the same has been adjudged by a court of competent jurisdiction.

State v. *Tappan*, 29 Wis. 687, 9 Am. Rep. 622; *Mills* v. *Charleton*, 29 Wis. 400, 9 Am. Rep. 578; *People* v. *Saginaw County Suprs.* 26 Mich. 22; *Sanborn* v. *Rice County Comrs.* 9 Minn. 273; *Brunswick* v. *Litchfield*, 2 Me. 28; *Hampshire County* v. *Franklin County*, *supra*.

Messrs. **Mills Gardner** and **John Logan,** for defendant in error:

If by mistake Lindsey paid with his own money a debt of the township of which he was treasurer, the taxing power may properly be exercised to reimburse him. The public has had the benefit of the payment, and the burden should not be borne by one citizen, but by the whole public.

Cooley, Taxation, 1st ed. 42; *Warder* v. *Clark County Comrs.* 38 Ohio St. 643; *State* v. *Board of Education of Wooster*, 38 Ohio St. 3; *State* v. *Hoffman*, 35 Ohio St. 435; *State* v. *Circleville*, 20 Ohio St. 362; Cooley, Const. Lim. *488; *Board of Education of Scio* v. *McLandsborough*, 36 Ohio St. 227.

The legislature may conduct the inquiry to ascertain the existence of the purpose for exercising the power of taxation.

Cooley, Const. Lim. 3d ed. *488.

In some instances the levy is made contingent upon the act of persons or bodies designated to execute the legislative will, attaining the end sought indirectly and conditionally through these subordinate agencies.

Cincinnati, W. & Z. R. Co. v. *Clinton County Comrs.* 1 Ohio St. 77; *State* v. *Harris*, 17 Ohio St. 608; *Walker* v. *Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *Hill* v. *Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289; *State* v. *Circleville*, *supra*.

In other instances the legislature has acted directly and absolutely without the employment of any of its subordinate agencies.

State v. *Franklin County Comrs.* 35 Ohio St. 458; *State* v. *Hoffman*, 35 Ohio St. 435; *Board of Education of Scio* v. *McLandsborough*, 36 Ohio St. 227.

Where a statute does not impinge upon any constitutional inhibition, the legislature is the sole judge as to the form it may be made to assume.

Kumler v. *Silsbee*, 38 Ohio St. 447; *Cincinnati, W. & Z. R. Co.* v. *Clinton County Comrs.*

supra; State v. *Hawkins*, 44 Ohio St. 109; *Metcalf* v. *State*, 49 Ohio St. 586; *State* v. *Harmon*, 31 Ohio St. 250; *People* v. *Flagg*, 46 N. Y. 405; 3 Am. & Eng. Encyclop. Law, pp. 691, 692; *State* v. *Hoffman*, 35 Ohio St. 435; *State* v. *Franklin County Comrs.* 35 Ohio St. 458.

There is no remedy by judicial process for a statute which may be considered merely an abuse of the taxing power; the authority to and duty to prevent abuse is entrusted to the legislature and not to the courts.

Walker v. *Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *State* v. *Franklin County Comrs. supra; Lehman* v. *McBride*, 15 Ohio St. 573.

Bradbury, J., delivered the opinion of the court:

The answer of the respondent, if true, shows that the demand of the relator has no foundation, whatever, in fact or justice; that the board of education was under no obligation, legal or moral, to pay the same, and that the fund to be raised by virtue of the act of the general assembly differed in no essential particular from a mere gratuity, provided for his benefit. The demurrer admits the truth of the averments of the answer. In such a state of things the act must be held invalid unless the general assembly has authority to command a local subdivision of the state to raise by taxation a fund for the benefit of an individual to whom it is under no obligation whatever, or where in such case a dispute exists, the enacting of a statute, wherein the facts are declared to be as contended by the claimant, is to be taken to be a legislative determination of the dispute in his favor, binding upon the parties, so that the alleged debtor will be estopped from contesting the existence of the disputed facts in the courts of justice. If either of these alternatives is true, there is no constitutional limitation on the power of the legislature to levy exactions on the public as a whole, or on subdivisions of it for political or governmental purposes, for the benefit of favored individuals.

It may be true that the responsibility the individual members of the legislature are under to their constituents, or their sense of public duty is a sufficient guaranty against any great injustice in this direction, and, therefore, that unlimited power of taxation vested in that body would not be followed by vicious results generally, though it might be in exceptional instances. However this might be, we, in the present inquiry, are more concerned in determining whether such unlimited power does exist that in the question of the wisdom and expediency of granting it.

Whatever power of taxation resides in the general assembly does so as an incident of the general legislative authority delegated to that body by section 1 of article 11, of the Constitution of 1851. This court holding in *Western U. Teleg. Co.* v. *Mayer*, 28 Ohio St. 521, that the provisions of article 12, of that instrument, though they relate to finance and taxation, are limitations upon rather than grants of power of taxation; and this, too, although section 4 of this statute expressly requires the general assembly to provide revenue to defray the yearly expenses of the state and pay the interest of its public debt. The power of taxation vested in the general assembly would have been just the same without, as with, this section.

That the authority to impose taxes is in its nature legislative, is established by the uniform current of judicial opinion. *Cass Twp.* v. *Dillon*, 16 Ohio St. 38; *State* v. *Harris*, 17 Ohio St. 608; *State* v. *Wilkesville Twp. Trustees*, 20 Ohio St. 288; *State* v. *Richland Twp. Trustees*, Id. 362; *State* v. *Circleville*, 20 Ohio St. 363; 25 Am. & Eng. Encyclop. Law; 18-71; Cooley, Taxation, 41-53.

That the legislative branch of the government is necessarily clothed with a broad discretion in determining the character, whether public or private, of the purpose for which funds may be raised by taxation is equally well settled. Cooley, Taxation, 43; 25 Am. & Eng. Encyclop. Law, 72; Cooley, Const. Lim. 599.

In doubtful cases the courts should not interfere with the exercise of this legislative discretion, and in all cases the legislative determination is entitled to great respect. *Hanson* v. *Vernon*, 27 Iowa, 28, 1 Am. Rep. 215; *Brodhead* v. *Milwaukee*, 19 Wis. 625, 88 Am. Dec. 711; 25 Am. & Eng. Encyclop. Law, 89, 90. That the power, however, is not unlimited is, we think, clearly established by the great weight of authority as well as of reason. *State* v. *Franklin County Comrs.* 35 Ohio St. 468.

The power of taxation is given to the general assembly as an indespensable means of providing for the public welfare, government could not be carried on without such power, and the power should be commensurate with the objects to be attained, but no good reason can be assigned for vesting it with power to take portions, large or small, of the property of one or a number of persons and granting it as a benevolence to another. Where a legislature attempts this, directly or indirectly, it passes beyond the bounds of its authority, and the parties injured may appeal to the courts for protection. The same constitution which grants the power of taxation to the general assembly recognizes the sanctity of private property, and declares that the courts shall be open for the redress of injuries.

This limitation on the legislative power of taxation is generally recognized by the authorities. The rule supported by a long array of adjudicated cases is laid down in 25 Am. & Eng. Encyclop. Law, 74, as follows: "It is within the province of the courts, however, to determine in particular cases whether the extreme boundary of legislative power has been reached and passed." In *Weismer* v. *Douglas*, 64 N. Y. 99, 21 Am. Rep. 586. Folger, *J.*, says: "But to tax A and others to raise money to pay over to B, is only a way of taking their property for that purpose. If A may of right resist this, as surely he may, how is he to make resistance effective and peaceable save through the courts, which are set to be his guardians? How may the courts guard and aid him unless they have power, upon his complaint, to examine into the legislative act, and to de-

termine whether the extreme boundary of legislative power has been reached and passed?"

It may be conceded that the general assembly may authorize one of the political subdivisions of the state to levy a tax to pay a demand not legally enforceable, but founded upon a moral consideration, or may even command that the levy shall be made for that purpose, and yet deny to it the power to determine conclusively the existence of such obligation.

On the other hand it may be contended that if the power to levy a tax for a private purpose is denied to it, it follows as a corollary that it had no power to determine the character of a demand, for if it had the latter power it could defeat the limitation by falsely finding the claim to be founded, at least, on a moral consideration. We do not think the conclusion follows, for that would be to impute bad faith to a co-ordinate branch of the government which is not permissible.

We think, however, that whenever a contention arises between an individual and some public body respecting the existence of a claim against the latter the controversy falls within the province of the judiciary. We do not deny the power of the general assembly to inquire into the merits of any claim sought to be asserted through its agency, before granting relief to the claimant by legislative action. Not only has it such authority but its exercise should be carefully and rigidly observed.

Such investigation, subsequent determination and resulting action, however, do not estop the parties from appealing to those judicial tribunals of the country that have been established under our constitution and by it vested with the judicial power of the state, and by our laws provided with an appropriate procedure to conduct such inquiries. Cooley, Const. Lim. 115, and cases cited; 3 Am. & Eng. Encyclop. Law, 681.

If, in the case under consideration, the relator has paid out money for the benefit of the respondent, for which, by some mistake, accident, or error, he has never received credit, it is morally bound to make it good and this moral obligation is sufficient to support the statute in question. *Lewis Merchants & Traders Bank Trustees* v. *McElvain*, 16 Ohio, 355; *Cuyahoga Falls Real Estate Asso. Trustees* v. *McCaughy*, 2 Ohio St. 152; *Burgett* v. *Norris*, 25 Ohio St. 308; *Fairden* v. *Holden*, 15 Ohio St. 207; *Cass Twp.* v. *Dillon*, 16 Ohio St. 38; *State* v. *Harris*, 17 Ohio St. 608; *Board of Education of Scio* v. *McLandsborough*, 36 Ohio St. 227; Cooley, Taxation, 127, 128; *State* v. *Richland Twp. Trustees*, 20 Ohio St. 362; *State* v. *Hoffman*, 35 Ohio St. 435; *Warder* v. *Clark County Comrs.* 28 Ohio St. 643; Cooley, Const. Lim. 283.

Where, however the facts, out of which a moral (or legal) obligation is claimed to arise, are disputed, the contention falls within the province of the courts, under the distribution of governmental powers prescribed by our constitution. Const. 1851, art. 4, § 1.

Judgment reversed and cause remanded with instructions to overrule the demurrer to the answer of the respondents.

NEBRASKA SUPREME COURT.

STATE of Nebraska, *ex rel.* Edward W. SAYRE, Treasurer of Scott's Bluffs Co.,

v.

Eugene MOORE, State Auditor.

(.....Neb.....)

***1. An attorney's lien for services** rendered his client cannot be *successfully* asserted against money appropriated to such client by an act of the legislature while such money is in the custody or under the control of the state treasurer.

2. The legislature, by an act duly passed and approved April 5, 1893, appropriated "the sum of $7,495.73 for the relief of Scott's Bluff county, and to reimburse said county for expenses incurred in the trial of one George S. Arnold upon the charge of murder." In a mandamus proceeding in this court to compel the auditor to draw his warrant in favor of the treasurer of Scott's Bluff county for the amount appropriated,—*Held:* (1) That the act was not in conflict with either the letter or spirit of the constitution. (2) That the appropriation of this money was in the nature of a donation, and that no inquiry or objection is admissible on the part of the auditor as to whether the appropriation was just, whether it was bestowed upon an undeserving recipient, or what motives influenced the legislature to make it; that the only duty left for the auditor, in the premises, was a ministerial one; and that he had no authority to supervise the action of the legislature by an inquiry into the actual expenditures of the county in the prosecution of Arnold.

(*Norval*, Ch. J., *dissents from the second clause of proposition 2.*)

(June 5, 1894.)

APPLICATION for a writ of mandamus to compel defendant as auditor of public accounts to issue a warrant to relator for the amount which had been appropriated by the state legislature for the relief of the county of which relator was treasurer. *Granted.*

The facts are stated in the commissioner's opinion.

Messrs. **M. J. Huffman,** *County Atty.*, and **Field & Holmes,** for relator:

There could be no such thing as an attorney's lien upon funds appropriated by the legislature.

Weeks, Attorneys at Law, p. 738, § 285; *Brooke's Case*, 12 Ops. Atty-Gen. 216; *Flint* v. *Van Dusen*, 26 Hun, 606; *Dodge* v. *Schell*, 20 Blatchf. 517.

*Headnotes by RAGAN, C.

NOTE.—On the question of appropriations of public money, see cases and annotation referred to in footnote to the preceding case of Board of Education of Marion Twp. v. State (Ohio) *ante*, 770, 25 L. R. A.

See also 25 L. R. A. 770; 28 L. R. A. 187.

If the congress of the United States under its implied powers is authorized to pass laws of a similar character to the one in question there can be no question as to the constitutionality of such laws when enacted by state legislatures when the constitution of the state has no provision prohibiting such legislation.

This appropriation was extended by the legislature as a charity and the amount of the relief was fixed and determined by the legislature and the sole and only duty of the auditor in relation to this claim is to satisfy himself that the law was legally enacted and if so to issue his warrant for the amount fixed and determined by the legislature; the act of the auditor is purely ministerial and he has no discretion in the premises.

Moses, Mandamus, pp. 84, 85; *Divine* v. *Harvie*, 7 T. B. Mon. 440, 18 Am. Dec. 194; *Merrill, Mandamus*, § 105; *High, Extr. Legal* Rem. § 34; 2 Spelling, Extr. Relief, chap. 42, §§ 1431 *et seq.*; 14 Am. & Eng. Encyclop. Law, pp. 99, 147; *State* v. *Cleveland*, 22 Ohio L.J.113; *Hewitt* v. *Craig*, 86 Ky. 23; *State* v. *Staub*, 61 Conn. 553.

A liquidated account is one the amount of which is agreed upon by the parties, or is fixed by operation of law.

Hargroves v. *Cooke*, 15 Ga. 321; *Bull* v. *Bull*, 43 Conn. 469; *Warren* v. *Skinner*, 20 Conn. 562.

The word "settle" when applied to a liquidated account or demand means to pay it.

Pinkerton v. *Bailey*, 8 Wend. 600; *Stilwell* v. *Coope*, 4 Denio, 225.

The word "adjust" when used in reference to a liquidated claim has the same meaning, though perhaps not quite so clearly.

The word "settle" when applied to an unliquidated claim or demand means its mutual adjustment between the parties and an agreement upon the balance.

Baxter v. *State*, 9 Wis. 39.

In reference to an unliquidated demand, the word "adjust" means "to determine what is due; to settle; to ascertain; as to adjust a claim, a demand, or a right."

Anderson, Law Dict.

When a claim is liquidated in the sense that its amount is fixed by operation of law, it is difficult to see how the comptroller can use any discretion in respect to it. When the law fixes definitely the amount of any claim, and also fixes the manner and time of payment, and the person to whom it is due, and the claim is presented to the comptroller by that person, and at that time, he has in respect to it "no discretion to exercise, no judgment to use, and no duty to perform" but to draw his order in payment of it.

State v. *Bordelon*, 6 La. Ann. 68; *Kendall* v. *United States*, 37 U. S. 12 Pet. 524, 9 L. ed. 1181; *Rice* v. *State*, 95 Ind. 33; *Angle* v. *Runyon*, 38 N. J. L. 403.

Mr. **George H. Hastings**, *Atty-Gen.*, for respondent.

Ragan, *C.*, filed the following opinion:

The Legislature of 1893 passed an Act (House Roll No. 278) in words and figures as follows: "An Act for the relief of Scott's Bluff county, Nebraska, and to appropriate $7,495.73 to said county. Be it enacted by the legislature of the state of Nebraska: Section 1. That there is hereby appropriated out of any funds in the state treasury, and not otherwise appropriated, the sum of $7,495.73 for the relief of Scott's Bluff county, and to reimburse said county for expenses incurred in the trial of one George S. Arnold upon the charge of murder, at the adjourned July term, 1889, of the district court within and for said county; and the auditor is hereby authorized to draw his warrant upon the state treasurer for the above amount in favor of said Scott's Bluff county." On August 5, 1893, the treasurer of Scott's Bluff county duly demanded of the auditor of public accounts that he draw his warrant upon the state treasurer, payable to the treasurer of said Scott's Bluff county, for the amount so appropriated by the legislature. The auditor declined to comply with this request, and thereupon the treasurer of Scott's Bluff county, as relator, filed in this court an application for a peremptory mandamus commanding the auditor to draw such warrant. The auditor answered the application, and alleged the following as reasons for declining to draw his warrant: "*And this respondent further says* that under the provisions of the constitution and laws of the state of Nebraska the auditor of public accounts has authority to examine and adjust all claims against the state, when presented to him, and to refuse to pay the same *when, in his opinion, the same are illegal or* unjust. And this respondent alleges that he found said claim for said Scott's Bluff county unjust and illegal: that the act making the appropriation is contrary to the letter and spirit of the constitution of the state of Nebraska; *that the said county of Scott's Bluff was put* to some expense by reason of said trial, but the amount thereof, this respondent alleges, upon information and belief, was a much less sum than the sum alleged to have been appropriated by the legislature. . . . This respondent further alleges that *heretofore, to wit*, on the 20th day of June, 1893, one Nellie M. Richardson . . . served upon this respondent . . . a notice of an attorney's lien upon said sum . . . appropriated by the legislature of the state of Nebraska for the use and benefit of said Scott's Bluff county, which said notice is in words and figures following: 'Notice. To Eugene Moore, Auditor Public Accounts of the State of Nebraska: You will take notice that I, Nellie M. Richardson, do claim an attorney's lien upon the funds appropriated by the legislature of the state of Nebraska to reimburse Scott's Bluff county for expenses incurred in the trial of George S. Arnold, in the sum of $1,500. [Signed] Nellie M. Richardson.'" To this answer the relator demurs. We will first dispose of the question of the attorney's lien attempted to be filed against this appropriation. Section 8, chap. 7, p. 90, Comp. Stat. Neb., provides: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed, from the time of the giving notice of the lien to that party." Now,

this money is not in Richardson's hands. It is in the hands of the treasurer of the state of Nebraska. And neither the state nor its treasurer are, or have been, adverse parties to any action or proceeding brought or had by Scott's Bluff county, for whom, it appears, Richardson is attorney. Richardson, then, has not brought herself within this statute, and that is one reason, at least, why she can have no lien on this money. But, if Richardson has rendered services for Scott's Bluff county, she can file her claim against the county, with the county clerk thereof, and have the county authorities of that county pass upon its merits. This court cannot audit her claim against Scott's Bluff county. The law has provided ample remedies and methods of procedure for all persons having claims against a county, and these remedies must be pursued. An attorney will not be permitted to use this court, in a mandamus proceeding, for the purpose of having the merits or amount of his claim against a county adjudicated. It may well be doubted if in any case an attorney's or other lien can be successfully asserted against money appropriated by the legislature to any person or corporation, public or private, while in the hands of, or under the control of, an officer of the state. It would be contrary to good public policy, and detrimental to the due administration of the affairs of the state, to permit its officers to be harassed and hindered in the discharge of their duties by parties asserting rights, either by way of attorney's liens, attachments, or garnishment proceedings, or otherwise, to funds in the hands of, or under the control of, such officers. The claim of Richardson filed with the auditor is not a lien on the money appropriated by the legislature to Scott's Bluff county, and the auditor may disregard such lien with impunity.

The next reason assigned by the auditor for not drawing the warrant to pay the appropriation is "that the Act making the appropriation is contrary to the letter and spirit of the constitution of the state of Nebraska." We quote Cooley's Constitutional Limitations (4th ed. p. 210), as follows: "When a law of congress is assailed as void, we look into the National Constitution to see if the granting of specified powers is broad enough to embrace it. But, when a state law is attacked on the same ground, it is presumably valid, in any case; and this presumption is a conclusive one, unless, in the Constitution of the United States or of the state, we are able to discover that it is prohibited. We look in the Constitution of the United States for grants of legislative powers, but in the constitution of the state to ascertain if any limitations have been imposed upon the complete powers with which the legislative department of the state is vested in its creation. A congress can pass no laws but such as the constitution authorizes either expressly or by clear implication, while the state legislature has jurisdiction of all subjects on which its legislation is not prohibited. The lawmaking power of the state recognizes no restrictions, and is bound by none, except such as are imposed by the constitution. That instrument has been aptly termed a legislative act by the people themselves, in their sovereign capacity, and is therefore a paramount law. Its objects is not to grant legislative power, but to confine and restrain it. Without the constitutional limitations, the power to make laws would be absolute." Tested by the rule quoted from this eminent jurist, there is nothing in the constitution of Nebraska that prohibits the legislature of the state—representing, as it does, the sovereignty of the people—from appropriating money to reimburse a county for expenses incurred by it in the prosecution of criminals. True there is no legal obligation resting on the state to pay such expenses, but the power of the legislature to appropriate money is not limited by the legal obligations of the state. We quote again from Cooley's Constitutional Limitations (p. 608), as follows: "It must also be stated that the proper authority to determine what should and what should not properly constitute a public burden is the legislative department of the state, . . . and in determining this question the legislature cannot be held to any narrow or technical rule. Certain expenditures are not only absolutely necessary to the existence of a government, but, as a matter of policy, it may sometimes be proper and wise to assume other burdens, which rest entirely upon considerations of honor, gratitude, or charity. . . . There will therefore be necessary expenditures, and expenditures which rest upon considerations of policy alone, and in regard to the one, as much as to the other, the decision of that department to which alone questions of state policy are addressed must be accepted as conclusive." This appropriation may be unjust. In making it, the legislature may have acted unwisely. But of these things the legislature itself is sole judge. The courts cannot inquire into either the motive or justness of the law. Their only concern is with its legality.

Finally, the auditor alleges as a reason for his refusal to draw this warrant, that by the constitution and laws of this state he has authority to examine and adjust all claims against the state, and that, while Scott's Bluff county was put to some expense in the prosecution of Arnold for murder, the amount of such expense, he (the auditor) is informed and believes, is much less than the sum appropriated by the legislature. In other words, the auditor's contention here is that, notwithstanding the legislature appropriated a specifically named sum of money for the relief of Scott's Bluff county, and to reimburse it for the expense incurred by it in the prosecution of Arnold, yet he (the auditor) is invested by the constitution and laws with the discretion to examine into and ascertain the exact amount of money expended by the county in the criminal prosecution, and then draw his warrant for such sum only as he ascertains the county expended. If by the express words of the act, or if by any reasonable construction thereof, it appeared that the legislature intended to appropriate $7,495.73, or so much thereof as might be necessary to reimburse the county, then doubtless the auditor's position would be tenable. But no such words of limitation of the amount appropriated are in the act, nor can they be read into it by any fair or reasonable construction. What was the intention of the legislature in the premises? Doubtless, to fully reimburse Scott's Bluff county for the expense incurred

by it in prosecuting Arnold for murder. The appropriation of this money—a gift, in fact—was within the power of the legislature; and no inquiry or objection is admissible on the part of the auditor as to whether the appropriation was just, whether it was bestowed upon an undeserving recipient, or what motives influenced the legislature to make it. Nor can the auditor be heard to say that the gift was too large; that the appropriation carried more money than was required to reimburse the county for what it had expended. The only duty left for the auditor in the premises is a merely ministerial one. He has no authority to supervise the action of the legislature by an inquiry into the actual expenditures of Scott's Bluff county in the prosecution of Arnold.

Section 9, art. 9, of the Constitution provides: "The legislature shall provide by law that all claims upon the treasury shall be examined and adjusted by the auditor and approved by the secretary of state before any warrant for the amount allowed shall be drawn: provided that a party aggrieved by the decision of the auditor and secretary of state may appeal to the district court." Now, what is meant in this constitutional provision by "claims upon the treasury" which the auditor must examine and adjust? We take it that it means claims which the state is or may be under legal obligation to pay, such as the salaries of its officers and employés, the costs of erecting buildings, and the expense attendant upon the maintenance of its prisons, asylums, schools, and other institutions. We do not think the appropriation of the specific sum by the legislature to a particularly-named person, as a donation, gift, or a reward, and for which the state was under no legal obligation, comes within the claims which the auditor must examine and adjust. True, "he is placed in his position as agent of the state to protect the treasury against demands not lawfully due and payable by the state; and when a claim is presented, he must ascertain whether or not there is authority of law for its payment, and if he finds such authority that should satisfy him. If the legislature has, by express enactment, directed that a certain sum shall be paid to a person, and appropriated the money for such payment, the auditor's duty in the premises becomes then merely ministerial. The power conferred upon him is not to supervise the action of the state, when, by its legislature, it has admitted and acknowledged the claim, and ordered it to be paid. Where the claim is not admitted by the state, he then stands in behalf of the state, and, as its agent, it is his duty to determine whether or not it is admissible, and justly and legally due; but when his principal, the state, whose officer he is, acknowledges the claim, and directs it to be paid, then, inasmuch as the state's regulation for the payment of money requires him to draw warrants upon the treasurer before such money can be paid, his duty is, without questioning, to conform to such direction. Finding the law for its payment to exist, he must regard that as plenary evidence that it is justly due. He cannot properly question the authority of an act of the legislature directing the payment of money by the state, or disregard its authority, however fully he may be convinced that the money is bestowed upon an undeserving recipient." *Angle* v. *Runyon*, 38 N. J. L. 403. "Whenever the money necessary to pay a particular claim against a state has been appropriated by the legislature, and the amount of the claim has been definitely ascertained in a manner prescribed by law, a refusal by the auditor of said state to draw his warrant upon the treasurer of the state for the payment of the claim will authorize the interposition of the courts by appropriate mandatory proceedings." High, Extr. Rem. § 100. True, the constitution makes it the duty of the auditor to adjust claims. "'Adjust' means to settle or bring to a satisfactory state, so that the parties are agreed in the result; as, to adjust accounts." Webst. Dict. We are aware that it was said in *State* v. *Babcock*, 22 Neb. 38, that the constitutional provision requiring claims upon the state treasurer to be examined and adjusted by the auditor applied to all claims, whether by virtue of a specific appropriation or not, and that the making of a specific appropriation by the legislature for the purpose of paying a demand against the state was in no sense the auditing of such claim. But that case should be distinguished from the one here. The appropriation considered in *State* v. *Babcock*, *supra*, was for paying the expenses incurred by the state in the prosecution of certain persons for crimes committed in an unorganized territory of the state. By the second section of that appropriation act it was provided, "And the auditor is hereby authorized to draw his warrant for the several amounts due to the parties named in this act," and the court said: "This language would seem to indicate that it was the purpose of the legislature that the outstanding indebtedness should be paid to the parties holding the claims, upon the ascertainment by the auditor of the amounts due to each of the parties named, but, of course, not in excess of the sum appropriated." It is also stated in *State* v. *Babcock*, *supra*: "The legislature has no authority, under the constitution, to audit or adjust a claim against the state; and if money is appropriated to pay an illegal claim, or one which the state does not owe, and the auditor so finds upon examination and adjustment, it is his duty to refuse to issue a warrant, notwithstanding said appropriation." But this point was not necessary to a decision of the case there decided, and the rule there announced should be restricted to such claims and demands as the state is under a legal obligation to pay, and not extended to appropriations of specific sums of money made by the legislature as a donation, gift, reward, or charity. Suppose the governor should offer a reward of $1,000 for the arrest and return to the state of a fugitive from justice, and A. should arrest and return the fugitive, and the legislature should, after inquiring and ascertaining that A. had earned the reward, appropriate $1,000 to him for having arrested and returned the fugitive. Could the auditor inquire into the value of the time and outlay of A. in arresting and returning the fugitive, and refuse to draw a warrant for only the value of A.'s time and expenses? In such a case, would there be any adjustment to be made by the

auditor of A's claim? Would the auditor have any duty to perform in the premises, but a mere ministerial one? Would he have any discretion in the premises? The legislature of 1893 (House Roll No. 85) appropriated the sum of $2,000 for the payment of damages sustained by one Maurer while engaged in the public service as a private in the Nebraska National Guards. It was recited in the act that Maurer was exposed to the cold and freezing weather, and by reason thereof he contracted rheumatism, which became chronic, and from which he suffered great physical pain, and became incapacited for work, and was prevented from following his vocation and earning a living, and that he was required to pay out large sums of money for medical care and attendance for a period of more than two years. When Maurer presents his claim to the auditor, can the latter institute proceedings to ascertain the value of the time lost by Maurer by reason of his rheumatism and sickness; the expenses paid by him for physicians, nurses, etc.? Can he call experts to testify as to whether Maurer's injury is permanent, and, if so, his expectancy of life, and the present worth of what he probably would have earned, had he not been injured? This legislative gift or donation to Maurer contains an allowance for physical suffering. Can the auditor say that too much was allowed for such suffering, and reduced the appropriation accordingly? We think not. And yet he may do all these things, in Maurer's case, if his contention here is correct, viz., that his duty as auditor requires him to ascertain the amount of actual expenses incurred by Scott's Bluff county in the prosecution of Arnold, and then draw his warrant for that sum only. Such cannot be the law. If it is, then, instead of a government of three co-ordinate departments, the legislative is subordinate to the executive department. The auditor is an able and conscientious officer, and deserving of the highest commendation for the jealous care with which he guards the public treasury, and he acts wisely in shielding himself from liability by the decisions of the courts in cases where he is in doubt; but in the case at bar he may not only legally draw the warrant demanded by the relator, but it is his duty to do so. He has no discretion in the premises.

The demurrer to the return is sustained, and the writ will issue as prayed for.

Judgment accordingly.

Norval, *Ch. J.*, dissenting:

Upon the question of the constitutionality of the act of the legislature under consideration, I express no opinion. While I concur in the views expressed by Ragan, *C.*, relating to the claim of Nellie M. Richardson for an attorney's lien, I am unable to agree to the proposition that the duty of the auditor in the premises is merely ministerial, and that he has no authority to examine into and determine the actual sums expended by the county in the prosecution of Arnold. I deem it proper to state the reasons for my dissent.

It is conceded by the majority opinion that mandamus would not lie "if by the express words of the act, or if by any reasonable construction thereof, it appeared that the legislature intended to appropriate $7,495.73, or so much thereof as might be necessary to reimburse the county;" and there can be no doubt of the soundness of the proposition stated. What, then, is the proper interpretation to be placed upon the statute under review? In the body of the act it is provided "that there is hereby appropriated out of any funds in the state treasury, and not otherwise appropriated, the sum of $7,495.73 for the relief of Scott's Bluff county, and to reimburse said county for expenses incurred in the trial of one George S. Arnold upon the charge of murder, . . . and the auditor is hereby authorized to draw his warrant upon the state treasurer for the above amount in favor of said Scott's Bluff county." It is argued that the legislature, by this act, appropriated a definite, specific amount to be paid the county; that the approval of this claim required of the auditor is merely formal; and that he can exercise no discretion whatever. The statute defining the duties of the auditor, as well as the constitution, requires that officer to examine and audit all appropriations; and it has been the universal practice in the auditor's office, since the adoption of the present state constitution, to do so, and that, too, in cases of appropriations as specific as is the case before us. This custom must have been known to the framers of this act at the time it was adopted, and it is fair to presume that the lawmakers intended that the claim of the county, which this appropriation was intended to pay, should be audited, as had been the custom theretofore. The object of the legislature in passing the act was to reimburse, or make whole, the county for all the legitimate expenses incurred by it in the prosecution and trial of Arnold, and nothing further. The statute regulates the costs in a criminal prosecution for a felony, and when the offense is committed in an organized county the law requires that the county where the trial is had shall pay the costs and expenses thereof. The legislature, by this act, undertook to relieve Scott's Bluff county of this burden. The appropriation reads, "For the relief of Scott's Bluff county and to reimburse said county for expenses incurred," etc. What was meant by the use of the word "reimburse?" Webster defines it thus: "To replace in a treasury a purse, as an equivalent for what has been taken, lost, or expended; to refund; to pay back; to restore; as, to reimburse the expenses of a war." In construing statutes, words should be given their ordinary meaning; and, so interpreting the language of this appropriation, it is clear to my mind that the state is only required to refund or pay to the relator the amount of costs and expenses incurred by the county in the trial of Arnold, not exceeding the sum appropriated for that purpose. The auditor was not directed by the act to draw his warrant upon the treasury for $7,495.73, but he was authorized to do so if it required that sum to reimburse the county. Was it the duty of the auditor, under the constitution and statute, without discretion, to audit this claim? By section 9, art. 9, of the state Constitution, it is provided that: "The legislature shall provide by law that all claims upon the treasury shall be examined and adjusted by the auditor and approved by the sec-

retary of state before any warrant for the amount allowed shall be drawn, provided that a party aggrieved by the decision of the auditor and secretary of state may appeal to the district court." In accordance with the requirements of the foregoing constitutional provision, the legislature, in 1877, passed a law providing for the examination and adjustment of claims upon the state treasury. Laws 1877, p. 202, Comp. Stat. chap. 83, art. 8. I here quote the entire act:

"Section 1. All claims of whatever nature upon the treasury of this state, before any warrant shall be drawn for the payment of the same, shall be examined and adjusted by the auditor of public accounts, and approved by the secretary of state: provided, however, that no warrant shall be drawn for any claim until an appropriation shall be made therefor.

"Sec. 2. The auditor of public accounts shall keep a record of all claims presented to him for examination and adjustment, and shall therein note the amount of such claim as shall be allowed or disallowed, and in case of the disallowance of all such claims, or any part thereof, the party aggrieved by the decision of the auditor and secretary of state, may appeal therefrom to the district court of the county where the capitol is located, within twenty days after receiving official notice. Such appeal may be taken in the manner provided by law in relation to appeals from county courts to such district courts, and shall be prosecuted to effect as in such cases: provided, however, that the party taking such appeal shall give bond to the state of Nebraska in the sum of two hundred dollars, with sufficient surety, to be approved by the clerk of the court to which such appeal may be taken, conditioned to pay all costs which may accrue to the auditors of public accounts, by reason of taking such appeal. No other bond shall be required.

"Sec. 3. In case the appeal shall be taken as provided in section two of this act, and on trial thereof, the district court shall be of the opinion that the decision of the said officers was wrong, either in fact or law, the said court shall reverse the same, and by its order and mandate require the said auditor to issue a warrant, in accordance with the provisions of section one of this act, upon the treasury for such an amount as shall be determined on the trial of such appeal to be legally due thereon. If either party feel aggrieved by the said judgment, the same may be reviewed in the supreme court as in other cases.

"Sec. 4. No claim which shall have once been presented to such auditor and secretary of state, and has been disallowed, in whole or in part, shall ever again be presented to such officers or in any manner acted upon by them, but shall be forever barred, unless an appeal shall have been taken, as provided in section two of this act.

"Sec. 5. When a claim has been in part allowed by such officers, a warrant shall be drawn as in other cases where the whole claim shall be allowed."

It will be observed that we have not only a constitutional provision, but an imperative statute, which requires, before any warrant shall be drawn by the auditor upon the state treasury, that the claim must be examined, audited, and allowed by the auditor, and approved by the secretary of state; and yet it is here sought to compel by mandamus the issuance of a warrant for the full amount named in the appropriation act, when the claim of the county has not as yet been passed upon by the auditor, nor has such claim ever been presented, either to him or the secretary of state, for approval. If the duty of the auditor and secretary of state, as regards the auditing of this claim, is ministerial merely, still the performance of such act is a prerequisite to the right of the auditor to draw the warrant. This is not a proceeding to require the approval of the claim, but to compel the issuance of a warrant without any approval by either of the officers named. To grant the writ is to disregard the plain requirements of both the constitution and the statute.

It is said the claims upon the treasury which the auditor is required to "examine and adjust," in the sense in which that term is used in the constitution, are "claims which the state is or may be under legal obligations to pay, such as the salaries of its officers and employes, the costs of erecting buildings, and the expense attendant upon the maintenance of its prisons, asylums, schools, and other institutions." We are unwilling to so limit the word "claims," but conclude it was employed in its broadest sense, and embraces every claim against the state for money under an appropriation made by the legislature. The constitution reads, "all claims," and we have no right to inject words into that instrument by judicial interpretation. That it is the right and duty of the auditor to pass upon and audit the claim under consideration, we entertain no doubt. Section 1 of the Act of 1877, above quoted, speaks of "all claims of whatsoever nature." More comprehensive language could not have been employed to express the legislative will. The section is too plain to leave any room for interpretation. Even though the construction adopted by my associates is the correct one, namely, "claims which the state is or may be under legal obligations to pay," are the only ones which the auditor is required to examine and audit, it is the duty of the respondent to pass upon and determine what amount of this appropriation Scott's Bluff county is entitled to receive, since, the moment the act took effect, if it is a valid and constitutional law,—and the majority have so found and declared,—the claim of the county for expenses incurred in the prosecution of Arnold becomes a legal obligation against the state.

It is said the duty of the auditor in the premises is a ministerial one merely, and that he has no authority to inquire into the amount of money actually expended by the county in the criminal case. The constitution and the statute quoted each provides for an appeal to the district court from the decision of the auditor and secretary of state in passing upon all claims upon the state treasury. Sections 6, 7, art. 3, chap. 83, Comp. Stat., are as follows:

"Sec. 6. All persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled, and allowed within two years after such claims shall accrue; and in all suits brought in behalf of the state,

no debt or claim shall be allowed against the state as a set-off, but such as has been exhibited to the auditor, and by him allowed or disallowed, except only in cases where it shall be proved to the satisfaction of the court that the defendant at the time of trial, is in possession of vouchers which he could produce to the auditor, or that he was prevented from exhibiting the claim to the auditor, by absence from the state, sickness, or unavoidable accident: provided, the auditor in no case shall audit a claim or set-off which is not provided by law.

"Sec. 7. The auditor, whenever he may think it necessary to the proper settlement of any account, may examine the parties, witnesses, or others, on oath or affirmation, touching any matter material to be known in the settlement of such account."

By said section 6 it is made obligatory upon all persons having claims against the state to exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled, and allowed, within a specified period after the accruance of the claim; and by the seventh section the auditor is clothed with the power to administer oaths, to take testimony, and examine witnesses and the claimant, if he deems it necessary to the proper adjustment of the claim or account. The duty enjoined upon the auditor is not merely ministerial, but, to a great extent, he exercises judicial functions; and from an order rejecting a claim, in whole or in part, an appeal lies to the district court. The conclusion is therefore irresistible, from a consideration of the several sections of the statute already referred to, and the provisions of the constitution quoted, that the duty of the auditor, in examining and adjusting claims presented against the state, requires the exercise of judgment and discretion to determine, not only whether such claim is a legal obligation, but whether the amount asked is justly due. After the auditor has passed upon and adjusted a claim, and the secretary of state has approved the same, we concede the auditor then has no discretion in the matter of drawing his warrant upon the treasury for the amount found due.

This case comes squarely within the decision in *State* v. *Babcock*, 22 Neb. 38. The Legislature of 1883 passed an act appropriating $6, 824.14 to pay the expenses incurred in the trial of I. P. Olive and others for murder, which act named the persons and the amount of money each should receive, and authorized the auditor to draw a warrant for the several amounts due the parties named in the act. The relator applied for a mandamus to compel the auditor to audit his claim, and to draw a warrant upon the treasury for the same. The court denied the writ. It was insisted in that case that the duties of the auditor were ministerial, and that he had no discretion in the premises. The court, after quoting section 9 of article 9 of the Constitution says: "This language clearly implies a limitation upon the power of the legislature in the matter of auditing claims against the state. The provision is imperative. The legislature shall provide that all claims upon the treasury shall be examined and adjusted by the auditor, and approved by the secretary of state, before any warrant shall be drawn or the money paid. These officers are, by the fundamental law of the state, made the examining board, through whose hands all claims must pass, and it is not within the power of the legislature to change this tribunal. It cannot review the decision of those officers, for the section clearly points out the reviewing court. The party aggrieved may appeal to the district court. The fact that the appropriation is specific can have no weight whatever, for section 22 of article 3 of the Constitution provides that 'no money shall be drawn from the treasury except in pursuance of a specific appropriation made by the law,' etc. All appropriations of money from the treasury are specific, and 'all claims upon the treasury shall be examined and adjusted by the auditor,' etc. This is no distinction in appropriations. It is true that, in the section [22, art. 3] above referred to, it is provided that 'no allowance shall be made for the incidental expenses of any state officer except the same be made by general appropriations,' etc.; but this provision can in no way change the fact that each appropriation contained in the general appropriation must be a specific appropriation for the purpose or officers named, and even then an account must be rendered, 'specifying each item.' Nothing can be more specific than such an appropriation. No warrant can be drawn except in pursuance of an appropriation, but the auditor may examine and adjust claims in the absence of such action by the legislature. While it is the duty of the legislature to see that no appropriations are made except for meritorious claims, yet such is the character of the safeguards thrown around the state treasury that such appropriation is by no means a final adjustment or auditing of the claim. It simply places so much of the funds in a position to be used by the auditor and secretary when the claim is examined and adjusted by the auditor, and his action is approved by the secretary. While the legislature may set apart money to pay a claim, it cannot pay it out, nor order it to be done, except in the manner provided by law. It has no jurisdiction to audit claims, and it is powerless to apply the money thereon without the quasi judicial concurrence of the officers named. If money is appropriated by that body to pay a claim, such action is not an adjudication upon its validity, to such an extent as to relieve the auditor and secretary from responsibility, for their duties remain as fixed by the constitution. This construction of the constitution has been adopted by the legislature, as well as by the supreme court in its former decisions." The above decision was cited with approval, and followed, in *State* v. *Moore*, 37 Neb. 507.

Towle v. *State*, 3 Fla. 202, was an application for a mandamus against the comptroller of the state, to compel him to audit, allow, and pay a legal claim against the state. The circuit court awarded the writ, and the supreme court, on appeal, reversed this judgment and dismissed the action, holding the claim could not be enforced by mandamus. The statute of Florida defining the duties of the comptroller in the matter of examining, auditing, adjusting, and settling of accounts and claims against the state is substantially the same as